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SOME POINTS IN THE LAWS OF WAR AND NEUTRALITY SEARCH AND BLOCKADE

BY

JOHN FRASER MACQUEEN ESQ.

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CHIEF POINTS IN THE LAWS

OF

WAR AND NEUTRALITY,

ETC., ETC.

BY THE SAME AUTHOR.

1. A PRACTICAL TREATISE on the APPELLATE JURISDICTION of the HOUSE OF LORDS and PRIVY COUNCIL; together with the PRACTICE on PARLIAMENTARY DIVORCE.

2. The RIGHTS and LIABILITIES of HUSBAND and WIFE; and

3. A PRACTICAL TREATISE on the LAW of MARRIAGE, DIVORCE, and LEGITIMACY, as administered in the Divorce Court and in the House of Lords. *Second Edition.*

Preparing for Publication.

A TREATISE on PUBLIC LAW; the CONFLICT OF LAWS; and COMPARATIVE JURISPRUDENCE.

CHIEF POINTS IN THE LAWS

OF

WAR AND NEUTRALITY,

SEARCH AND BLOCKADE;

WITH

THE CHANGES OF 1856, AND THOSE NOW PROPOSED.

BY

JOHN FRASER MACQUEEN, Esq.,

ONE OF HER MAJESTY'S COUNSEL.

LONDON AND EDINBURGH:

WILLIAM AND ROBERT CHAMBERS.

1862.

"Maritime Law in time of war has long been the subject of deplorable disputes."—*Declaration of the Great Powers at Paris, April* 16, 1856.

"Her Majesty's Government wish to establish a doctrine for all time."
—EARL RUSSELL *to the American Envoy Extraordinary, 28th Aug.*, 1861.

"The Declaration of Paris in 1856 forms a new era in International Law."—M. HAUTEFEUILLE.

"It is necessary that controverted questions of neutrality, contraband, blockade, and privateering, should be disposed of speedily and for ever."
Examiner, 22nd Dec., 1861.

TO

SIR ROUNDELL PALMER, M.P.,

HER MAJESTY'S SOLICITOR-GENERAL;

THESE

"CHIEF POINTS" OF A SCIENCE

WHICH HE HAS ADVANCED,

ARE INSCRIBED.

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CHIEF POINTS IN THE LAWS

OF

WAR AND NEUTRALITY,

ETC.

THE Law of Nations during war has many admirable propositions, which we trust will never be disturbed. It has also some questionable maxims. These last must be examined with reverence, but with freedom.

My purpose is to state shortly the chief points, to put forward here and there a suggestion, and to leave to the reader's judgment the decision.

I begin with the rules which ought to govern belligerents in their enemy's country. The other divisions will be taken in the order of the preceding table.

SECTION I.

Belligerents in the Enemy's Country.

Principle of terror in ancient wars.

1. In ancient times an invading army, to inspire terror, sought the earliest opportunity of displaying its severity. The slaughter of those who held out was vindicated on the ground that destroying one garrison without mercy might pre-

vent others from resisting, and so save the effusion of blood. To this sophistry, Lord Brougham tells us, the answer is obvious; for that by the same reasoning war might be proved innocent in proportion to its cruelty.*

Leniency and forbearance now enjoined.

2. Vattel, the great authority of the last century, enjoins leniency and forbearance. He denounces the laying waste of the Palatinate by Turenne. And the truth is, that cruelty, pillage, and marauding, though practised largely in the first Napoleon's wars, have no sanction from any modern jurist.

The Duke of Wellington's wise practice.

3. Our illustrious Duke of Wellington punished all predatory aggressions committed by his troops.† He made them pay their way. The protection of the inhabitants from wanton injury he considered a high duty, and, for evident reasons, the best policy. The French more than once felt, to their cost, the effects of an opposite line of conduct.

Count Diebitsch's example.

4. When Count Diebitsch with his Russian army entered Roumelia, in 1829, he gave a shining example of military clemency. He assured the Mussulmans that they should be safe in their persons and property; and that he would not disturb either the exercise of their religion, or the course of their civil administration; but he required them to deliver up their arms, as a deposit to be restored on the return of peace.

* England and France under House of Lancaster, p. 206.

† The proof of this is everywhere; but chiefly in his advances into France, in Spring 1814, and to Paris, in July 1815. See Sir Archibald Alison's great work.

5. The conduct of this humane Russian commander harmonizes with a benignant doctrine stated by an illustrious writer: "Upon the taking of a town, or the subjection of a province, it is usual among civilized nations to afford protection and full security to the inhabitants; and such of them as do not choose to live under the new government are allowed a reasonable time to dispose of their lands and effects, and to depart in all safety." *

Mr. Burke's benignant doctrine.

6. In the Italian war of 1859, remarkable for the enormous bodies of troops assembled, "we are told that the two hostile armies passed over the richest plains in Europe, leaving behind them little trace of their presence except on the actual battle-fields." †

Italian war of 1859.

7. Marshal Brune, a jurist and a man of literature before he became a soldier, stated to the Duke of York, in 1799, during an armistice in Holland, "that if the Duke should cause the dykes to be destroyed, and the country to be inundated, when not useful to his own army or detrimental to the enemy's, it would be contrary to the laws of war, and must draw upon him the reprobation of all Europe." ‡ The proposed exploit, if the story be true, was in imitation of Louis XIV.'s accomplished one, which procured

Marshal Brune's remonstrance against destroying the Dutch dykes.

* Dodsley's Annual Register, 1772, p. 37, drawn up by Mr. Burke.

† See an able Pamphlet on "Maritime Capture, by a Lawyer." Ridgway, 1862.

‡ 1 Kent's Comm. 92.

for that king, as Voltaire says, the "deplorable glory of having destroyed one of the masterpieces of human industry."

Destruction of vines and fruit-trees in Affghanistan.

8. The destruction of the vines and fruit-trees in Affghanistan, a serious injury to that country without any corresponding benefit to the invaders, was undoubtedly a breach of the laws of war.

Destruction of granaries at Odessa.

9. In bombarding Odessa, the English and French Powers did their best to save the granaries, not merely from considerations of humanity, but also from a regard to the law of nations; every country in Europe deriving benefit from those stores. This ground was expressly taken by the Emperor Nicholas, when he complained that factories, warehouses, and shops, had been destroyed.

Destruction of forts and stores.

10. We can understand why private property, instruments of husbandry, and every article of a peaceful character,—and more especially why churches, temples, libraries, pictures, statues, and public monuments, are invariably spared in war. But how as to fortified places and military stores? The case of Almeida raises this question. There General Brienne, having determined to cut his way through the British besieging forces, determined also, as a preliminary, to destroy the fortress, with all its military stores. This double operation he executed with an ability and success commended by Colonel Napier.* But General Sarrazin, in his history

* See Napier's Peninsular War.

of the Spanish campaigns, expresses an opinion that the destruction of the fort and stores of Almeida was a violation of the laws of war. We should have thought that it was a laudable achievement, otherwise it would seem that the common practice of spiking artillery is indefensible.

Charleston stone fleet.

11. But what shall we say as to the late operation at Charleston? The Stone Fleet, if intended to be a permanent impediment to commerce, may justly be regarded as a world-wide injury, and consequently a breach of the law of nations.

Louis XIV. and the Eddystone Lighthouse.

12. During Queen Anne's wars a French privateer seized the workmen employed in erecting Rudyerd's Lighthouse on the Eddystone Rock, and carried them off as prisoners; but Louis XIV. immediately ordered their release, bestowed on them presents, and sent them back to their duty, declaring that "although he was at war with England he was not at war with mankind."

Consideration for women and children.

13. Dr. Phillimore* tells us, that at Sebastopol "the English general refused to abstain from firing upon a particular quarter said to be inhabited by women and children, but he offered them a free passage beyond the lines of the army."

Prisoners of war.

14. The old rule was, that prisoners of war became the slaves of the victor, who had the power of life and death. At Rome, the more distinguished were reserved for the triumph, and

* Int. Law, vol. iii. p. 142.

butchered afterwards. Contrary cases are mentioned as wonders. In the days of chivalry, the hope of ransom alone caused quarter to be given.* The vanquished Sultan Bajazet was carried about in a cage.† Bynkershoek, the great jurist, writing not far from our own time, defends the hanging of prisoners. But in modern warfare between Christian nations mercy is shown, and everything done to soften the mishap of a brave enemy. This appeared on both sides in the Crimean contest. At the battle of Solferino, the Emperor of the French gave orders that the wounded Austrians should be treated precisely as if they were his own soldiers.

Section II.

Belligerents in their own Country.

Defensive destruction of property by Peter the Great.

1. Let us next inquire, how far during war is a Government entitled to destroy, or mutilate, its own territory, and the property of individuals thereon? Vattel thinks that even here there is a limit.‡ He is of opinion that the

* See *Henry V.*, Act iv., scene 4, where Pistol exacts "egregious ransom," under the last penalty.

† The disputed cruelty of Timour—a savage and an infidel—was surpassed by the authentic and more recent cruelty of a renowned Christian prince, Bedford, the brother of Henry V., under whose auspices Joan of Arc—a prisoner of war in the truest sense of the phrase—was exhibited to the populace in an iron cage on her way to Rouen, where she was burnt alive. The story is too shocking to read. The excuse is, that Joan was considered a sorceress. Lord Brougham, in the excellent book already cited, shows that the French were more to blame in this affair than the English; pp. 221 to 297.

‡ *Lib. 3, c. 9, § 167.*

policy of Peter the Great, who laid waste eighty leagues of his empire in order to arrest the progress of Charles XII., could be justified by nothing short of an imperious necessity.

By the Emperor Alexander.

2. So, on the French jurist's authority, we may lay it down that the course taken by Alexander required the like excuse, when he made a desert, and fired Moscow, for the reception of Napoleon. Such violent remedies, even though defensive, are not often to be resorted to. Vattel holds that a prince who without the strongest grounds should imitate the example of Peter the Great, would be justly culpable in the eyes of his own countrymen. Whether other nations might complain he does not say.

By William the Silent.

3. In 1573 William the Silent cut the dykes round Leyden, then besieged by the Spaniards. The land was laid under water, and the crops were swallowed up. It was an extreme step, but justified by necessity and by success. The tide destroyed the besieging army, and brought up the Zeeland fleet laden with provisions for the famishing inhabitants. Thus Leyden was saved.

By Jacopo del Verme.

4. Nearly two centuries before, when the duties of belligerents in their own country were less understood, or less attended to, than in the days of William the Silent, Jacopo del Verme, apparently without necessity, and certainly without success, cut the dykes of the Adige, in the hope of destroying the Floren-

tine army, commanded by Sir John Hawkwood; but that skilful leader effected a retreat, without material loss, leaving the Milanese to deplore their useless sacrifice of territory.*

Vindictive destruction of property.

5. An injury to ourselves may be an injury to others. If when the English and French bombarded Odessa, the Russians had vindictively destroyed its corn magazines, a question might have arisen whether such an act was not contrary to the laws of war.

Vindictive closing of harbours.

6. Suppose a dangerous sea-coast, extending hundreds of miles, with only one harbour. Are we to entertain a doubt that the world at large has a right to exact the benefit of that harbour? The owners of the soil have but a qualified property in it. This extreme case tries the principle, and shows its irresistible authority. We cannot always do what we will with our own.

Defence of mercantile towns.

7. To defend an unfortified mercantile town completely invested by the enemy, has been held a breach of the laws of war, because such a case is one for honourable surrender—to prevent useless carnage and the unavailing destruction of property.

Defence of fortified towns.

8. On the 30th August, 1759, the Austrian forces, having finally established their batteries around Breslau, sent a message to Count Tavenzien, who commanded the town, reminding him that as it was a mercantile place, not a fortress,

* Poggio Bracciolini, Hist. Florent.; Sismondi, Hist. Rep. Ital.

he could not defend it without contravening the laws of war. The Count, in the character of a military jurisconsult, admitted the law, but denied the fact; affirming that "Breslau, being surrounded by military works and wet ditches, was a place of strength, and not merely a mercantile town."* He therefore called upon the Austrians to do their worst.

Section III.

Belligerents at Sea.

Capture of enemy's property a duty.

1. We should have expected that the humane and just principles applied to property on land would also be applied to property at sea. But this is not so. On the contrary, all property, public or private, belonging to the enemy, if found in an enemy's ship at sea, or in port afloat, is liable to capture. In other words, what is prohibited on land is perfectly allowable, and is in fact prescribed as a duty, at sea.†

When capture impracticable, destruction enjoined.

2. But even at sea we are not to appropriate or to destroy the enemy's property, *brevi manu*: there must be an adjudication. Hence it is a

* Dodsley's Annual Register, 1760, p. 18, drawn up by Mr. Burke.

† The inoffensive mercantile mariners navigating the vessel, and all others on board (being of the hostile nation), are on capture of the ship made prisoners of war, and, if necessary, put under hatches. Sometimes they are handcuffed; but it is not usual (according to the mildness of modern practice) to put them in irons, though on a late occasion this was done.

violation of the maritime code to burn merchant ships instead of taking them to a Prize Court. At the same time it is to be remembered that the captors may not always be able to take the ship into port. In such a case, Lord Stowell said that the "captors could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested—if impossible to bring in, their next duty is to destroy it."* There are other authorities to the same effect. Indeed, Dr. Lushington, in "The Leucade," † lays it down that "the destruction of a vessel under hostile colours is a matter of duty;" and that "the bringing of an enemy's vessel to adjudication is not called for by any respect to the right of the enemy proprietor."

Marine severities vindicated by jurists.

3. Still the question remains—on what principle of justice is the property of peaceful merchants liable to capture at sea; while the very same property, belonging to the very same individuals, if found on land, would be treated with forbearance? The jurists do not explain why this should be. Chancellor Kent ‡ tells us "that there is a marked difference in the rights of war carried on by land and by sea;" adding that "the object of a maritime war is the destruction

* 2 Dodson, 381.

† 2 Spinks Ecc. & Adm. 231.

‡ Vol. i. p. 107. See also Wheaton's Elements, p. 429, and *Hansard*, 14 July, 1857, where Lord John Russell says, "the comparison between private property in ships and private property on land is not tenable."

of the enemy's commerce and navigation, in order to weaken and destroy the foundation of his naval power;" but that "the usage is not to touch property on land without making compensation." He assigns no reason for the distinction. It is scarcely a satisfactory solution to say that the general use of maritime insurance casts losses at sea on those who by contract are bound to sustain them.

Opinion of Lord Clarendon.

4. An eminent statesman,* after observing that "by land we should think it disgraceful to seize the property of peaceful persons, even subjects of the enemy," adverts to the difference of the rule at sea; and declares that there is no assignable reason for the distinction, "except, perhaps, that acts committed at sea are less under observation than those committed on land; and the force of opinion is, consequently, less brought to bear on the former."

Seizure of fishing-boats.

5. Not only is it the practice to capture and condemn as lawful prize the enemy's merchantmen and cargoes, but, during our later wars with France and Holland, we condescended to humbler booty; for we seized the boats of French and Dutch fishermen, who plied their precarious industry upon our coasts, and we treated them exactly as if they were prosecuting, not a harmless and useful, but a criminal occupation.

Remarkable case before Lord Stowell.

6. Lord Stowell seems to have pronounced judgment with but little satisfaction in a case of

* Lord Clarendon.—*Hansard*, 22nd May, 1856.

this description which came before the Prize Court, on the 13th November, 1798. A small fishing vessel having been captured by British cruisers on her return from the Dogger Bank to Holland with a cargo of cod, his Lordship delivered the following opinion:—

"In former wars, it has not been usual to make captures of these small fishing-vessels; but this was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighbouring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment, they must be referred to the general principles of this Court; they fall under the character and description of ships constantly and exclusively employed in the enemy's trade.—*Condemnation.*"

Indulgence to fishermen granted, but revoked.

7. It would appear that shortly after the above decision (and possibly through the intervention of Lord Stowell), some indulgence was vouchsafed to the French fishermen; but it also appears that from this indulgence evil consequences arose, or were supposed to have arisen. Belsham gives the following account:*—

"On the 21st of January, 1801, Mr. Secretary Dundas apprized the Lords of the Admiralty, that it was His Majesty's pleasure to revoke the indulgence granted to the French fishermen; and

* Hist. of Eng., vol. xii. p. 169.

that they and their boats should be henceforth subject to capture—advices having been received that these fishermen were under requisition, and that even those who had been released from prison, in order to be sent home, on the express condition of not serving again, were comprised in that requisition. It was His Majesty's further pleasure, that all those set at liberty on their parole be required to return into this country; and that those among them who shall neglect to obey these orders, shall be made to suffer all the rigors of the laws of war, in case they should again be made prisoners while serving the enemies of His Majesty. M. Otto, on the 29th of January, immediately apprized M. Talleyrand of this measure, the true motives of which he declared himself unable to conjecture; at the same time expressing his fears that, from the intentional delay in the communication of the order, a great number of unfortunate persons must have fallen victims to it. M. Otto also addressed a reply to the British Government, deprecating 'a measure hostile to a peaceable class of people, for the most part, aged, invalids, or children, who were consequently incapable of hurting the enemies of their country; and whose simplicity of manners and industrious habits could not give any umbrage.' This act of provocation awakened the highest resentment in the First Consul, who sent instructions to M. Otto to declare to the British Government, that the French Government could not, on its part, think of making the poor fishermen victims of the prolongation of hostility, and therefore, that it would abstain from reprisals, having given orders that all French ships, armed for war or cruising, should leave the occupation of fishermen undisturbed."

Fishermen released on parole.

Indignation of the First Consul.

Humane French ordinance.

8. It is remarkable that a French ordinance issued so far back as 1543 gave protection to fishermen during hostilities. It was obeyed till the time of Louis XIV., but afterwards fell into disuse, owing to the ill-faith exhibited, as Valin affirms, "by the enemies of France." The ancient and excellent ordinance thus neglected may now perhaps be regarded as the germ of a better policy; though, when we look at the date of it, we may be apt to think that the world does not always advance in humanity as it advances in civilization.

Section IV.

Belligerents and Neutrals.

The war must be "regular."

1. The war must be what is called in the language of international law a *regular* war. It may be between two separate states, by the sovereign authority of each; or it may be between one portion of a state and another portion of the same state. Suppose a rebellion, or a clamour for secession. Let us take rebellion first. It involves a civil war. Of this nature was the revolt of the Low Countries against Spain, three centuries ago. No one disputed that the most cruel of all contests which then ensued between sovereign and subject was orthodox, so far as neutrals were concerned, however much it violated the municipal code. It was not for the world at large to

await the recognition of the tyrannical Philip.* Then as to secession. The attempt may be illegal. The actors may be traitors. But at a necessary period the law of nations will step in to define and to fix the rights and duties of the belligerents relatively to neutrals. At all events, we must hold that, ever since the date of Queen Victoria's proclamation,† the unhappy civil war now raging in America has been *regular*. The Federal Government itself, both by conduct and by direct appeal, has invoked the law of nations, which, where it properly applies, must be accepted by all; but it does not follow that the municipal relations are displaced as between the belligerents. The Southern insurgents may be rebels, and may continue rebels, till their rebellion has succeeded or has been suppressed.

Case of the American war in 1780.

2. After describing Lord Cornwallis's severities in South Carolina, Mr. Massey says: ‡—"The American insurgents, once they had been admitted to the privileges of civilized warfare, could no longer be dealt with as rebels." This proposition, though just and generous, seems doubtful in point of law. It was not until subsequently to the South Carolina severities that the American conflict received, from the King's speech, opening Parliament in November, 1780, the title of "a war." Prior to that speech, it was a rebel-

* Lord Brougham's Political Philosophy, vol. iii. p. 375.
† 13 May, 1861.
‡ Hist. of Geo. III., vol. iii. p. 26.

lion; and it was so studiously described and treated by the British Government. The present American insurgents were pronounced rebels by the Secretary-at-War in the House of Commons, on the 11th of March, 1862. What the law is, — is one thing. It is a very different consideration whether its penalties should be enforced. Upon the question of policy and humanity, all must agree with Mr. Massey. But let us not forget that, although the rebellion of 1745 had every mark of civilization, especially on the part of the vanquished, the chief of them were executed on Tower Hill for their treason.

Division into belligerents and neutrals.

3. Supposing the war to be regular, the law of nations divides mankind into two classes, belligerents and neutrals. A and B are belligerents at war with each other. All the other letters of the alphabet are bystanders, that is to say, neutrals, looking on, but taking no part in the fray.

Neutrals must hold the war "just."

4. It is a maxim that so long as the established rules are observed, the war, being regular, must, in the eyes of neutrals, be deemed a *just* war, which the jurists rather oddly explain to mean just on both sides.* They are not satisfied

* "Les guerres doivent être réputées justes de la part des deux belligerants."—HAUTEFEUILLE, *Des Droits et des Devoirs des Nations Neutres*, lit. 3, chap. 1, s. 2, vol. i. p. 133, 2nd edit. Vattel says, "*La guerre en forme, quant à ses effets, doit être regardée comme juste de part et d'autre.*"—B. 3, c. 12, § 190. Vattel says "this is absolutely necessary." But it would rather appear to be a superfluous refinement. In another place Vattel affirms with great truth that "a war *cannot* be just on both sides."—B. 3, c. 3, s. 39.

with saying that neutrals have nothing to do with the merits of the belligerents' quarrel. The jurists insist that neutrals shall blindly "accept the facts without discussing them." We know, however, from recent observation, that neutrals disregard this injunction. They never do accept the facts without discussing them. On the contrary, they examine the facts critically, discuss them copiously, and form their opinions upon them freely. But it does not follow that, because they may deem the war unjust, or absurd, they are on that account to interfere and put an end to it. They have no high duty to perform. They may look on with composure. It is enough that they submit patiently to the humiliations and disadvantages which, as will appear by-and-by, are abundantly cast upon them by the maritime law of nations.

Asylum belligerent vessels.

5. Neutral nations usually give an asylum in their ports to the ships of both belligerents; and we have seen this done recently, under circumstances which might, perhaps, have justified a refusal of the favour.

To grant such an asylum to one belligerent, and refuse it to another, would be, to use the language of the jurists, unneutral. The belligerents have no right to ask the benefit of neutral ports, or roadsteads; but in the case of storms, or pressure of any kind, to deny refuge would be uncharitable and unchristian; and there

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is authority for holding that it would be contrary to the law of nations.

Rules as to their departure.

6. When two vessels, hostile to each other, meet in a neutral port, or when one pursues the other into a neutral port, they must behave themselves peaceably while there. Should one of them sail away, the other must not follow until after twenty-four hours have elapsed. One object of this regulation is to prevent any reasonable chance of collision upon the coast.

Great duty of neutrals.

7. In time of war, the great study of surrounding nations is to abstain diligently from doing anything that may interrupt the proceedings of the combatants. However great the inconvenience, the rule is that states not engaged in the conflict shall permit it to proceed without impediment, without remonstrance, and without complaint. Courtesy so elevated and so refined does not exist in private life; for, when we see two men fighting in the street, our first impulse is to separate them, especially if the match be unequal. Should they resist our importunities, and by persevering stop the thoroughfare, we call in the police, who at once take charge of the offenders.

Favour shown to belligerents.

8. To these simple dictates of reason and justice the law of nations, as now established, does not accede.* That law accords to belligerents

* It may, perhaps, be doubted whether, in the case of small insignificant states, the rule of private life would not be applied. Great states have licence—or take it.

certain rights, or rather high privileges, uniformly vexatious and often deeply mischievous to neutrals, whose only remedy is submission. Belligerents are, in fact, favourites of the maritime law, which seems to frown on all who are at peace with their fellow men. Why, or how, this should be, it is not easy to explain satisfactorily. The doctrine arose in remote and barbarous ages; but our chief difficulty is to understand how, with all its oppressive incidents, it has been so long acquiesced in. "Let us inquire," says a distinguished modern jurist, "what is the nature of this exorbitant right of belligerents? For what purpose has it been created? and what are its proper limitations?"

Neutrals must not assist.

9. The law requires that neutrals shall not assist either of the belligerents. If they do, they cease to be neutrals, and become principals. This is reasonable.

Neutrals may trade with belligerents, but restrictedly.

10. Neutrals, however, are not interdicted from trading with belligerents. They may maintain their commercial relations with A and with B; in other words, with either, or with both, of the belligerents. This being so, suppose a merchant, in the ordinary course of his business, transmits arms and ammunition to A. This will be a hazardous adventure; for arms and ammunition so sent to A may injure B, and, therefore, it is open to B, as the law stands, to capture and confiscate both the ship and the cargo. So in like

manner let us suppose that the same merchant, in the same course of business, sends arms and ammunition to the opposite belligerent, B. Here it will be competent to A (as it was in the other case to B) to capture and confiscate both the ship and the cargo.

Justice of the restriction examined.

11. But is it not a fair question for consideration, whether an act performed in the ordinary, legitimate course of commerce can reasonably be deemed a breach of neutrality? The merchant pursues his lawful avocation. Regardless of the war, he looks only to his profits. The belligerents, in his eyes, are customers, and he hopes they are solvent. He deals indifferently with A, or with B, or with both, in the systematic prosecution of his honourable calling. If one belligerent derives more benefit from commerce than another, it is because his resources are greater, and not because neutrality has been violated. His superiority in this respect is a source of strength, and an element of success, which the other belligerent ought to have considered before entering on the contest.

That fire-arms, &c., prolong war.

12. The jurists, however, take another ground. They affirm that supplies of arms and ammunition prolong the war; a mischief which is not obviated, but increased, by accommodating both parties alike.

This position examined.

13. Now, is it quite certain that supplies of arms and ammunition have really the effect of

lengthening the contest? Are they not more likely to abridge it? What is the best recommendation of our modern improvements in gunnery, and of the general advance which has recently been made in the military art? Beyond all question, *this*—that they accelerate the result, and, on the whole, diminish the sacrifice of human life. Sir William Armstrong is a public benefactor, and has been rewarded as such. The Minie rifle, which kills at a thousand yards, is a meritorious invention. If we had had only bows and arrows and battering-rams in the Crimea, when would Sebastopol have been taken? One of our wars with France lasted a hundred years. This could hardly have happened had the true capabilities of fire-arms, especially of artillery, been then understood.*

Opinion David Hume.

14. The most sagacious of historians, Mr. Hume,† remarks that artillery, "though it seems contrived for the destruction of mankind, has in the issue rendered war much less bloody, for by its means nations have been brought more to a level," and peaceful consummations are more

* The above suggestions are well supported by the *Standard* of 4th February, 1862, in the following pointed sentences:—"Napoleon overran Italy in a month, and conquered Prussia in a week. The Duke of Wellington marched out of Portugal on May 22, 1813; fought the battle of Vittoria, on June 21; and before the end of the month there was not a Frenchman left in Spain. So there were but three months from Elba to Waterloo. Napoleon III. met the Austrians, first at Magenta, on June 3, 1859, and finished the campaign at Solferino in less than a month." What, then, becomes of the jurists' assertion, that "arms and ammunition prolong the war?"

† Hist., vol. ii. p. 466.

rapidly accomplished. This great writer commends, as a social improvement, the happy invention of gunpowder, war's first instrument, but the most powerful of all agents in hastening its termination.* The reasoning of the jurists, therefore, on this fundamental point, proceeds on a debateable basis, and calls for further examination. That reasoning, whether right or wrong, (I offer no opinion either way,) is unquestionably the parent of the celebrated doctrine called "contraband of war;" a doctrine which will be considered in the next section, and to which, by recent and coming events, great interest has been imparted.

SECTION V.

Search for Contraband of War, &c.

The Queen's proclamation as to contraband.

1. The Queen's proclamation† as to contraband of war has for its object, not to guarantee even-

Opinion of Captain Gulliver.

* The efficacy of gunpowder, as a pacificator, is more powerfully described by Captain Gulliver than by any other writer. In his advice to the King of Brobdignag, he says: "I told his majesty that I knew the ingredients very well, and the manner of compounding them; and that I could direct his workmen how to make hollow tubes, of brass or iron, of a size proportionable to all other things in his majesty's kingdom, and the largest need not be above a hundred feet long; twenty or thirty of which tubes, charged with the proper quantity of powder and balls, would batter down the walls of the strongest town *in a few hours*." The king, whom the captain describes as narrow-minded, rejected this proposal.

† *Infrà*, p. 91.

handedness to the belligerents, but to keep out of trouble her own people. It warns Her Majesty's loving subjects that they abstain from

"Carrying officers, soldiers, dispatches, arms, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations for the use or service of either of the said contending parties."

Opinions thereon by Lords Ellenborough, Granville, and Kingsdown.

2. On the 16th of May, 1861, the following remarks fell from the Peers in Parliament:—

Lord Ellenborough: "I regret to see so much vagueness in the expressions used as to contraband of war. How are plain men to find out what articles have of late been so considered by the usage of nations? What are the further articles not mentioned? The law with respect to contraband of war is in a state of constant change. I recollect to have found in the law books of best authority, that all these changes were controlled by one prevailing principle, namely, that *that* is contraband, which, in the possession of an enemy, would enable him better to carry on the war."

Earl Granville: "The Government has followed the usual course. Contraband of war must vary according to the character of the war. The decisions of a prize court, unless there has been a flagrant violation of international law, all those who have recognized the rights of the belligerents must accept."

Lord Kingsdown: "The determination of what is contraband must depend on the circumstances of each particular case. Provisions, if sent to a port where an army is in want of food, might become contraband."

Provisions deemed contraband.

3. We know that England detained neutral vessels going to France with corn, meal, and flour, because these articles were eminently calculated to avert starvation. "The situation of France was such as to lead to that mode of distressing her;" so said Mr. Hammond on behalf of the British Government, in 1793.

Medicinal plants contraband.

4. It is difficult to believe, what however is asserted, that in the exercise of our belligerent rights we "endeavoured to deprive the enemy's hospitals of one of the most healing plants which Providence has bestowed on suffering mortals." *

Quasi-contraband men, dispatches, &c.

5. Besides contraband *proper*, there are cases of *quasi*-contraband, applicable to persons and dispatches. Both are subject to the same discretionary principle, leaving it very much, if not entirely, for the judge to decide what does, and what does not, involve the legal penalty.†

Lord Stowell's comprehensive principle.

6. "It will be sufficient," says Lord Stowell, "if there is an injury arising to the belligerent from the employment in which the vessel is found. The master may be ignorant and perfectly innocent. But if the service is injurious, *that* will be sufficient to give the belligerent a right to prevent the thing from being done."‡ This

* *Edinb. Rev.* of 1812.

† See Dr. Pratt's valuable Treatise on Contraband of War; and Mr. C. Clark's Disquisition on the Trent case.

‡ 6 Rob. 430. It is not clear that the above are detached dicta. But if they are, they are Lord Stowell's. He revised his judgments, first in manuscript and afterwards repeatedly in print. The reports in fact are not the Reporter's, but the Judge's. Even when at the bar, Lord Stowell began with

a foreign jurist calls the *ad libitum* doctrine. The declaration of 1856, to which we will advert hereafter,* does not define contraband of war.

Stoppage and search for contraband.

7. That declaration is also silent as to the rights of stoppage† and of search. The belligerent, therefore, must either renounce these rights, or humble every neutral ship by their exercise; for without stoppage, and without search, he cannot ascertain whether the neutral has, or has not, contraband on board.

Consequences of search for contraband.

8. When the belligerent finds contraband on board, he will of course take the ship into port; but he must bear in mind Lord Stowell's humane injunction, "not to handcuff the crew, or put them in irons, except in extreme cases."‡ If he find no contraband, he permits the ship to proceed on her voyage.

When there is doubt as to contraband.

9. Suppose the result of the search to inspire a doubt: in that case the belligerent commander having a public duty to perform, will reserve the doubt for the judge, and take the neutral vessel into port.

written speeches. Everything he delivered had a literary finish. In the decisions of this judge, no hasty dicta are to be found. See Rush, Sec. Ser., vol. i. p. 15. The decisions of Lord Stowell are not in every hand; but the best of them are given by Mr. Tudor in his Leading Cases on Mercantile and Maritime Law. See also the Manual of Maritime Warfare, by Messrs. Hazlitt and Roche.

* *Infrà*, pp. 45 and 89.

† The approved mode of stoppage is by cannon shot,—le coup de canon de semonce.

‡ The San Juan Baptista, 5 Rob. 33; The Die Five Damer, Ib. 357.

Sale and conveyance of contraband not an offence in the neutral state.

10. In every belligerent state the conveyance to the enemy of contraband articles is treated as a delinquency. But it is not so regarded in the neutral state. Thus, notwithstanding the Queen's Proclamation, a British merchant may now lawfully sell contraband articles to an American purchaser, nay, he may even carry them to New York or to Charleston, if he chooses to run the risk of seizure *in transitu*.*

Visit to ascertain nationality.

11. In the last number of the "Edinburgh Review"† there is an able and candid article on "belligerents and neutrals." It advises the retention of the "right of visitation on the high seas to ascertain the true *national character* of mercantile ships." This is quite distinct from the right of search for contraband; although the mode of proceeding is the same. The Reviewer thus describes it:—

"The visit is made by an officer in uniform, who proceeds peaceably to the merchant vessel in a boat manned by two or three men besides the rowers, and retires when his lawful inquiries are satisfied."

The writer next observes that what is done is "analogous to the production of a passport by travellers on the Continent;" but—to omit the considerations which have brought passports somewhat into disfavour lately—it must be

* See all this admirably explained in Sir Roundell Palmer's speech, of the 20th of February, 1862, *infrà*, p. 94.

† Jan. 1862.

remembered that the exaction of them assumes sovereignty. There is no sovereign on the high seas.

Section VI.

Blockades.

1. Superior in rank to the right of stoppage on the high seas, is the right of blockading an enemy's port,—the most singular of the belligerents' many startling prerogatives. This operation is performed and maintained without the slightest regard to the injury which may thereby be occasioned to neutrals, the great object being to cut off all communication between those who are within and those who are without the place beset. Access and egress are equally deemed offences: not wrongs, but crimes. A blockade is said to be "an act of sovereignty," though why it should be so specially is not explained. It is also called "a conquest." But it may be asked whether it is not rather an act of forcible occupation,—a trespass, precarious in tenure, and transient in duration; in truth, without anything to justify it but power. Be this, however, as it may, the Queen's Proclamation* charges and commands her loving subjects that they abstain from Blockades.

"Breaking or endeavouring to break any block-

* *Infrà*, p. 91.

ade lawfully and actually established by or on behalf of either of the said contending parties."

Their principle examined.

2. The doctrines of blockade, even with the restrictions which have been put upon them, illustrate remarkably the indulgence and partiality exhibited by international maritime law in favour of belligerents at the expense of neutrals. Two states have a perfect right to go to war with each other on a point the most frivolous imaginable. But are they, or is either of them, entitled to inflict injury, or even serious inconvenience, on the rest of mankind, who desire to be at peace? That important question is not discussed by the jurists. Yet is it one very fit for consideration. And here we will enlist the aid of an admirable text, usually, but erroneously, attributed to the Roman Civil Law—a law which has but little in common with the existing Code of Nations.* *Sic utere tuo, ut*

Note as to the Roman Civil Law.

* Those who know the Civil Law need not be told that it is purely municipal. The modern Code of Nations considers all states as equal. The Romans admitted no equals. Their "jus gentium" was not international. Let any one find a word about belligerent as contradistinguished from neutral rights in the Civil Law; or anything about searches for contraband, or breaches of blockade. The Romans, indeed, had a Fecial College as old as Numa Pompilius. It ruled forms and ceremonies; but had little to do with justice or humanity. Julius Cæsar, famed for clemency, murdered his prisoners of war. The Iroquois Indians *ate* theirs; though, as Montesquieu says, they sent and received ambassadors. It was the dismemberment of the Roman Empire and the establishment of Christianity, fully developed, that gave birth tardily to the law of nations. It is the opinion of M. Hautefeuille, that injudicious attempts to import Roman Law into the International, have done harm, the principles of the two systems being essentially different. What is good in the Roman law is inapplicable; what is bad has done mischief. If Lord Stowell, who made

alienum non lædas, which may be thus interpreted: So conduct your war as to inflict no damage on your peaceful neighbours. Now what is the effect of a blockade? Doubtless to injure the enemy; and, so far, all is fair and right. But suppose it ruins the trade of third parties: suppose it to bring starvation on millions of industrious individuals who have nothing to do with the contest but to deplore it and pray for its cessation. May it not be doubted whether a system which produces the consequences now felt in England and France is not wrong at the foundation? And may it not also be a question whether there is not a time when submission ceases to be a duty and resistance becomes a virtue? That time, however, we are authorized by high opinions to say, has not yet arrived.*

They should be real.

3. But to resume our exposition. The blockade, to be binding, must be real, and there must be notice of it, so that all to be

so many prize rulings, once cites a text from the *Corpus Juris Civilis*, on a point of international law, our memory fails. The Rhodians were the true parents of maritime law. Their rules, however, were not international, but municipal, and as such were adopted by Augustus and Antoninus. The truth is, that the idea of a Code of Nations was suggested by the remarkable confederation of the German Principalities and the league of Free Towns, formerly established in different parts of Europe for purposes of mutual protection. See Lord Brougham's Pol. Phil., vol. ii. p. 491; Hallam's Middle Ages, vol. ii. p. 140. Vattel, in his Preface, avers that Hobbes was "the first who gave a distinct, but yet imperfect idea of the Law of Nations;" and this is perhaps the reason why the descendant and editor of that philosopher made the very able speech which will be found *infrà*, p. 100.

* Debate in the House of Commons, March 7, 1862; and see especially Sir Roundell Palmer's Speech, published by Ridgway.

affected may be upon their guard. The impediment, too, must be by ships of war placed in such juxtaposition as to enable them to constitute an insuperable barrier. It is said that privateers cannot perform or assist in this work; though why does not appear, or at all events does not appear rationally.

From these premises it follows that what is called a paper blockade,—that is to say a blockade by mere proclamation, without ships, or with but an inadequate force of ships,—is entitled to no deference from neutrals. This doctrine received the sanction of the Paris Congress in 1856.*

The real blockade has limits.

4. Then does it follow that a real blockade is harmless? On the contrary, the more impassable the barrier the greater the hardship on innocent sufferers. But a real blockade has limits, which a paper one has not. The real blockade cannot range over three thousand miles of coast. It injures neutrals indeed; but it does not insult their understanding.

Ought blockades to be abolished?

5. It may be said that to abolish blockades would be a hardship upon belligerents. But may it not be answered, that to continue blockades would be a greater hardship upon neutrals? Who are the most entitled to favour,—the bulk of mankind, who are at peace, or the small, ill-conditioned portion who fight for an idea? Even supposing war to be a necessary evil, the struggle

* See *infrà*, pp. 53 and 90.

should be to make its mischiefs as small as possible to those not engaged in it.

Severe penalties for the breach of them.

6. Breaches of blockade are in the Prize Court treated as delinquencies, which bring into requisition the criminal vocabulary. Formerly imprisonment or other corporal correction, sometimes even death itself,* was inflicted upon offenders. The modern usage has confined the penalty to confiscation of ship and goods. If a vessel has contracted guilt by a breach of blockade, the offence is not discharged till the end of her voyage. But when the blockade itself ceases, the delictum ceases. Such is the law as administered in England; and Mr. Justice Story lays down the same doctrine for America.† The decisions for breaches of blockade, though falling short of ancient severity, are still well fitted to secure obedience. Thus, for example, it is held that the mere sailing for a blockaded port, knowing it to be blockaded, is a breach of the blockade, by reason of the criminal intent, which, though unexecuted, involves condemnation.‡

Lord Stowell appears to have considered the breach of a blockade an act of deep turpitude. But it may be doubted whether it would be universally so regarded in the present day. Some might now think it a meritorious achievement, legitimate in object, and not the less

* Manning, 319. † Cranch, p. 440.
‡ 1 Robinson, 154.

entitled to commendation because daring in execution. For, although a breach of blockade is dealt with as a delinquency in the blockading state, it is not so regarded in the neutral state. The Queen's Proclamation seems to be but little more than an admonition to her loving subjects, and all who look up to her for protection.*

Essentials of blockade in the present day.

7. In the late discussion,† the Solicitor-General made the following remarks as to the essentials of a blockade, having regard to modern changes, arising from the use of steam and other causes.

The blockade, says Sir Roundell Palmer,‡ must be

"A *bonâ-fide* blockade, by a force sufficient to maintain it on the spot; and there must also be a sufficient notification of some kind or other of that blockade. These are the two principles. Whatever may be found in some writers, not now of recent date, it is perfectly clear that we have no exact technical definition of what constitutes such a sufficient force. You cannot *à priori* lay down what particular number of frigates or other ships of war shall be an adequate force in any hypothetical case. The improvements in modern warfare, the introduction of steam, or any other similar change, may have made sufficient or insufficient now, means of blockade which were not so before."

* See Sir Roundell Palmer's speech, of the 20th of February, 1862, *infrà*, p. 94.

† In the House of Commons, on the 7th of March, 1862.

‡ Speech of 7th of March, 1862, published by Ridgway.

8. The Solicitor-General, on the same occasion, furnished the following test, whereby to fix the sufficiency of a blockade.* He said:— Test of sufficiency.

"What, from the beginning of this century, has been laid down as the test in this matter? Why, in the first place, that of 'evident danger'; and, then, that due credit must be given to the judgment of the naval officers intrusted with the execution of the service."

9. So again as to intermissions of blockade— some inconvenient doctrines are corrected by the Solicitor-General in the following passage: † — Intermissions and revivals of blockade.

"After a blockade has been intermitted, it may be resumed; and when it is resumed, as soon as persons have knowledge of the fact, whether by formal notification of the renewal or otherwise, it becomes as binding again, so far as those persons are concerned, as if it had not been intermitted. It is only during the period of intermission, or as to ships which come in, or intended to come in, during the period of intermission, or which may be affected with notice of the original blockade only, and not of the renewal, that the fact of intermission has any effect."

10. Blockades, like war itself, seem to be a necessity. For this reason it would be desirable, if it were practicable, to render them less noxious to neutrals. What is blockade? Let us look at the plain import of the word. Lord Chancellor Westbury encourages us. He lately resolved, with the concurrence of the other law Blockades without captures.

* Speech of 7th March, 1862, published by Ridgway.
† Ibid.

peers, a most difficult point in the House of Lords, very much by the aid of etymology; which, learnedly and wisely applied, will often clear obscurities and bring us back to the good sense of a perverted institution. Lord Campbell, on the bench, made many appeals to Dr. Johnson. Now, that great authority tells us, that to blockade is simply "to shut up by obstruction." The lexicographer says nothing of seizures or confiscations; because these, and the many harsh maxims which attend them, have nothing to do with blockade in its primitive and true acceptation.

When the first blockader invested a place, he warned off all neutral merchantmen. He "shut them out by obstruction." But it is not clear that he made prizes.

Would blockades without captures be effective?

11. We conceive (speaking without experience, having never seen a blockade), that seizures and confiscations are scarcely worth the trouble, the expense, and the odium they occasion. Whether blockades without captures would prove effective may be a question. But this is to be remembered—the taking of captured ships into port for adjudication is often a tedious and difficult, and sometimes a perilous operation, which must always more or less occasion a diminution of the blockading power, scarcely compensated by the spoil of neutral property, which rewards the men employed.*

* See *infrà*, p. 43

How far this mode of remunerating Her Majesty's navy is suited to the dignity of a great nation, and how far it comes up to the requirements of an enlightened age, and an advanced civilization, seem to be topics not unfit for the consideration of the Legislature.

Section VII.

The Prize Jurisdiction.

1. Describing the catholic character of the prize jurisdiction, Lord Stowell, at the close of the last century, thus expressed himself:— Opinion of Lord Stowell in 1799.

"It is the duty of the judge to administer that justice which the law of nations holds out without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country; but the law itself has no locality. The person who sits here is to determine this question exactly as he would determine the same question if sitting at Stockholm; asserting no pretension on the part of Great Britain that he would not allow to Sweden." *

2. So said Lord Stowell in 1799. Seven years afterwards, France, with hardly a man-of-war at sea, declared England and her colonies in a state of blockade; and England retorted by her orders in council, whereby she declared that France, and her Allies as well as her colonies, His opinion in 1812.

* 1 Rob. 350.

were in the same predicament. Of course all neutral nations suffered incalculably. They complained that they were made the victims of a double blockade unexampled in its range, yet composed almost entirely of paper, and having not a leg to stand upon in the shape of precedent or authority in the law of nations. They protested without effect. England on the one hand, and the "French Ruler," as he was called, on the other, were too much for the rest of Europe. Still the neutral traders had one consolation. They called to mind the Court which "had its seat locally here, but which was bound to administer a law which had no locality." In answer to their appeal, Lord Stowell "delivered himself with a power of language which never forsook him, and which might have convinced any person except the suffering parties to whom it was addressed." Said this great magistrate, of whom the Courts of Doctors' Commons may well be proud:—

"It is strictly true that the king in council possesses legislative powers over this court; and may issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this court. These two propositions, that the court is bound to administer the law of nations, and that it is bound to enforce the king's orders in council, are not at all inconsistent with each other. The constitution of this court relatively to the legislative power of the king in council, is analogous to that of the courts of common law

relatively to that of the parliament of this kingdom. Those courts have their unwritten law, the approved principles of natural reason and justice; they have likewise the written or statute law in acts of parliament, which are directory applications of the same principles to particular subjects. What would be the duty of the individuals who preside in those courts, if required to enforce an act of parliament which contradicted those principles, is a question which I presume they would not entertain *à priori*. In like manner, this court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen."

These opinions contrasted.

3. The discerning reader will perhaps recognize the hand that penned the following paragraph: *—

"If we venture to dispute the law recently laid down by the learned judge (Lord Stowell), it is upon his own authority. By what stretch of ingenuity can we reconcile the position that the court treats the English government and foreign governments alike, determining the cause exactly as it would if sitting in the claimant's country,—with the new position that the English government possesses legislative powers over the court, and that its orders are, in the law of nations, what statutes are in the municipal law?"

Th Court has two masters.

4. The result is that our Prize Court, whilst affecting to administer the maritime law of nations, is in fact bound to obey orders in

* *Edinb. Rev.*, Feb., 1812.

council and proclamations issued by one of the very parties who are litigating before it.

Serious consequence.

5. On this point we consider it a positive duty to quote the following admirable sentences from the skilful pen aforesaid : *—

"What analogy is there between the proclamations of one belligerent as relating to points in the law of nations, and the enactments of statute as regarding the common law of the land? Were there indeed any general council of civilized states—any congress such as that fancied in Henry IV.'s famous project for a perpetual peace —any Amphyctyonic Council for modern Europe, its decisions and edicts might bear to the established public law the same relation that statutes have to the municipal code; because they would be the enactments of a common head, binding on and acknowledged by the whole body. But the edicts of one state, in questions between that state and foreign powers—or between that state and the subjects of foreign powers—or between those who stand in the place of that state and foreign governments or individuals—much more nearly resemble the acts of a party to the cause, than the enactments of the law by which both parties are bound to abide. Mark the consequences of such loose doctrines, such feeble analogies. They resolve themselves into an immediate denial that any such thing as the law of nations exists, or that contending parties have any common court to which all may resort for justice. There may be a court for French captors in France, and for English captors in England. To these tribunals, such parties may respectively appeal in safety;

* *Edinb. Rev.*, Feb., 1812.

for they derive their rights from edicts issued by the governments of the two countries severally; and those edicts are good law in the prize courts of each. But, for the American neutral claimant, there is no law by which he may be redressed, no court to which he may resort. He is a prey to the orders of each belligerent in succession. Even under the old and pure system of 1798 and 1799, the neutral was forced to receive his sentence in a foreign court, always the court of the captor's country. But how is it now, when the court, sitting as before, has made so large a stride in allegiance, as to profess an implicit obedience to the orders of the belligerent government within whose dominions it acts?"

Lord Stowell's position difficult.

6. Dr. Phillimore is clear that the "Orders in Council of 1807 contravened the international law;" but he admits that Lord Stowell "carried them into execution."* The position of this Judge was one of difficulty. He acted under two authorities. He tried to obey both, even when they disagreed. We can now do justice to his motives; but his fine diction, his delightful manners,† and his real purity, all failed to save him from the censure of his contemporaries. Thus, in addition to the strictures we have quoted, we find that Mr. Horner, who was in constant communication with some of the best men of his time (among others, Sir Samuel Romilly, Sir James Macintosh, and Lord Henry

* 3 Phill. Int. Law, p. 539.
† See Townsend's Memoir.

Petty), wrote to John Allen: * "Sir William Scott (Lord Stowell) is said to have furnished ministers with his opinion in favour of our right to search ships of war for deserters." The British Government had the very month before conveyed to the American minister a disavowal of any such right.† About the same period,‡ Mr. Horner, writing to Mr. Murray (afterwards the eminent Scotch judge), says: "Sir William Scott told Sydney Smith that no *principle* is more *plainly* laid down than our right to take the navy of the Danes; and so he has been ready to say, and would be still ready, for any outrage, or breach of the law of nations, that the Government of this country has dared, or is meditating, to commit." The remarks of Mr. Horner are too severe; but they show the impression entertained respecting Lord Stowell by men of the first eminence in this country. But, if we turn to foreign writers, of neutral nations, we shall find not only strong reprehension, but even imputations of corruption. The American jurist, Mr. Wheaton, who had served diplomatically in sundry parts of Europe, sets out in his "Elements" the grievances of the Baltic Powers, which they referred to the supposed "tyranny" of England, as exercised in her Prize Jurisdiction.

* August 31, 1807. Horner's Memoirs.
† See 4 James's Nav. Hist., 333.
‡ September 29, 1807.

He goes particularly into the complaints of Denmark, when Lord Stowell decided that ships under convoy were liable to visit and search, and subject to confiscation for refusing to submit to either.* Mr. Wheaton was himself deeply imbued with the feelings described by him. Speaking of Lord Stowell, he says, "that highly-gifted and accomplished man has been compelled to avow that he was bound by the King's instructions; and we know that his decrees are liable to be reversed by the Privy Council, from which those instructions emanate. The rapacity and injustice of the British Courts of Vice-Admiralty in the colonies are notorious." † Mr. Wheaton even talks of "the pure hands" of the American judges,‡ apparently by way of contrast to the hands of Lord Stowell, and the hands of the colonial Vice-Admiralty judges. The editor of the "Elements," Mr. Lawrance, charges Lord Stowell with "ministerial subserviency." § He remarks that Lord Stowell "at one time appeared to regard the text of the King's instructions as binding on his conscience;

* *Maria*, 1 Robinson, 340. Lord Stowell's judgment in this case is admirable in composition, argument, and diction; but the decision is in the last degree questionable. Mr. Massey, in his instructive history, says, that "a right of search can never be made to extend to ships under the immediate protection of a man-of-war. An attempt to enforce it under such circumstances is an insult to the flag so challenged." It is curious that Lord Stowell, in this case, speaks about the Roman Civil Law; but he cites no text, and we believe it would be difficult to find one on the privileges of maritime convoy.

† Introd. Rem., p. 37.

‡ Ibid.

§ Introd. Rem., p. 79.

at another, he held it indecorous to anticipate the possibility of their conflicting with the law of nations." * It is very true the same writers are equally liberal of their condemnation when speaking of French Prize Jurisdictions. But this only raises these questions: first, whether neutrals are likely ever to be satisfied with adjudications coming from a belligerent state, their opponent in the prize litigation; and secondly, whether it would not be better to place this invidious jurisdiction in some separate, independent, and disinterested territory. This suggestion, however, is not free from difficulties; nor are we at all clear that any good would come of it. It is the law itself—so hard on neutrals—that causes the evil, and not the instrument of its administration.

Lord Stowell severe on neutrals.

7. It is not wonderful that Lord Stowell should have been considered a harsh judge towards neutrals; for unless where there was gross culpability on the part of the captors, although restitution might be ultimately ordered, neither damages nor costs were awarded against them.

Indulgent to captors.

8. We are told by that eminent judge, Dr. Lushington, that, "during the seventeen years Lord Stowell presided in the Prize Court he had condemned captors in costs and damages in only about ten or a dozen cases; not one in a thousand." † On another occasion Dr. Lushington

* Introd. Rem., p. 37.

† The *Ostsee*, Dr. Spinks' Prize Cases, 174.

said, "he believed that not one case would be found where Lord Stowell condemned the captors in costs and damages upon the ground that the papers and depositions did not disclose a probable cause of capture." * Accordingly the marginal note or summary of a most important case decided by Dr. Lushington during the late Russian war is in these words: "If captors seize a vessel without any ostensible cause, they are liable to costs and damages; but this is the extremity of the law of nations, and should only be adopted in cases of imperative necessity." † Such cases were evidently rare in Lord Stowell's time; though not quite so rare as Dr. Lushington imagined; for on an appeal from his decision in "The *Ostsee*," coming before the Judicial Committee, in 1856, Lord Kingsdown, in giving judgment, observed "that the cases in which during the late war restitution was attended with costs and damages, turn out upon inquiry to be more numerous than was supposed." ‡

Prize money awarded to captors.

9. In those cases, undoubtedly few and far between, where damages and costs were awarded against the captors, the amount was generally, if not invariably, made good by the Government. And this was not unreasonable. It was the policy of the Government to stimulate the energy of its officers; and if they acted in obe-

* The *Leucade*, Spinks' Prize Cases, 224.
† The *Ostsee*, Dr. Spinks' Rep. p. 174.
‡ Spinks' Prize Cases, p. 174.

dience to orders, the state must indemnify them. It appears accordingly, that the occupation of captors was not without other advantages besides the satisfaction which arises from the performance of a duty—the general practice having been to distribute among them the proceeds of prizes,* *pour encourager les autres.*† The practice in America appears to correspond; for we remark that Captain Wilks claimed credit for the sacrifice he made in forbearing to take the *Trent* into port on a late memorable occasion. ‡

Temptation to random captures.

10. It requires but little reflection to perceive that random seizures must have been frequent under a system which rewarded the captors with prize money when in the right, and protected them from penalties when in the wrong. Lord Kingsdown has said, "that the temptation to send in ships for adjudication is sufficiently strong." In Lord Stowell's time it was too strong.

* 3 Phillimore, Int. Law, p. 459.

† A most learned friend states, with reference to the practice in Lord Stowell's time, that "the desire of encouraging captures was predominant. The distinction, however, was made between the captors, whether they were officers in the navy or captains of privateers. In the case of the former, the Court 'felt great anxiety to protect them, perhaps, sometimes even beyond what could be strictly reconciled with principle.'—*Nemesis*, Edw. Rep. 52. At all events, except in flagrant cases, it would protect them. Upon several, besides those referred to in 'The *Ostsee*,' the Court has intimated an opinion that the Government should protect officers in the navy."

‡ See his letter to the Secretary of the Navy at New York, dated from on board the *San Jacinto* at sea, November 16, 1861.

11. The law of Lord Stowell, bound his successor Dr. Lushington in the Court below; but it was corrected in the Judicial Committee by Lord Kingsdown, from whose judgment we deduce the following propositions:— Correction of Lord Stowell's law.

"A ship may, by her own misconduct, have occasioned her capture; and in such a case it is very reasonable that she should indemnify the captors against the expenses which her misconduct has occasioned.

"Or, she may be involved, with little or no fault on her part, in such suspicion as to make it the right, or even the duty of a belligerent, to seize her. There may be no fault either in the captor or the captured; or both may be in fault; and in such cases there may be *damnum absque injuriâ*, and no ground for anything but simple restitution.

"Or there may be a third case, where not only the ship is in no fault, but she is not, by any act of her own, voluntary or involuntary, open to any fair ground of suspicion. In such a case a belligerent may seize at his peril, and take the chance of something appearing on investigation to justify the capture; but if he fails in such a case, it seems very fit that he should pay the costs and damages which he has occasioned."*

Section VIII.

Late Changes in the Maritime Law of Nations.

1. At the close of the Crimean war, the leading powers of Europe, namely, Great Britain, Austria, The Paris "Solemn Declarations."

* 2 Spinks' Ecc. & Adm. Rep., p. 171.

France, Russia, Prussia, Sardinia, and Turkey, were represented at Paris by their respective plenipotentiaries; who, assembled in congress, applied themselves to the important task of amending what they called the "maritime law in time of war;" that law having long been confessedly productive of "deplorable disputes," which, they held, might thereafter "occasion serious difficulties, and even conflicts." To avert such calamities for the future, the plenipotentiaries, on the 16th April, 1856, "adopted" certain "solemn declarations," which will in due time be specified.

How far they bind.

2. But before doing so, it is fit that we consider for a moment how far these "solemn declarations" are binding. On this interesting point, Lord Derby* has made the following observations:—

"Undoubtedly it is true that the agreement of the Congress has not up to the present moment the binding force of a treaty; nor has it been ratified by the sovereign. It does not alter the real state of international law; but I hold that all the powers whose representatives signed this paper, and who have not since disavowed it, are morally bound by the liabilities and obligations imposed upon them at the time."

If this country is morally bound, it is bound legally; for, although there is some countenance for the doctrine which says that an engagement

* 7 Feb., 1862.

entered into by a plenipotentiary requires the subsequent ratification of the sovereign, yet is this a doctrine which most people will think more honoured in the breach than the observance; and such evidently is the opinion of Lord Derby. It is also the opinion of Lord Russell, who, though he holds that the "Declarations" were on our part "very imprudent," and though he considers the "whole matter most unsatisfactory," he yet "does not see that a breach of faith would at all mend our position."* We have, moreover, the reply of Lord Granville to Lord Derby, stating that the course taken by our plenipotentiary† had the entire approbation of the British Government; who, after many interchanges of communication, and after profound deliberation, came to be of a clear opinion "that it was for the benefit of this country that the rules agreed upon at Paris should be adopted."

Privateering abolished

3. This being so, let us examine the "solemn declarations" in their order. The first of them is couched with commendable brevity in the following odd terms:—

Privateering is, and remains, abolished.

Great Britain is supposed to have gained much

* *Hansard*, July 14, 1857. It appears that the Paris Declarations are now agreed to by all the great states excep America.

† The Earl of Clarendon.

by the abolition of privateering. The French journalists allege that it was for this reason she acceded to the second "solemn declaration," which we shall come to presently. In fact, Lord Clarendon has said as much. On the 22nd May, 1856, in his place in the House of Lords, giving an account of his stewardship at Paris, he, among other things, stated that the abolition of privateering was "more than an equivalent for the abandonment of a claim which could not have been sustained."

Effect on America.

4. America was asked to concur with the Plenipotentiaries, but she refused, simply because America wished to retain privateering, unless a resolution were come to that all private property, belligerent as well as neutral, should be held inviolable and sacred at sea. Both countries, England and America, proceeded on intelligible principles. England has a great mercantile marine, and also a great navy. She therefore requires no privateers, and it is her interest that other nations should dispense with them. America, on the other hand, has a great mercantile marine but a small navy. America, consequently, encourages individual enterprise in war, and is, in fact, obliged to rely upon it. The Legislature of New York, in 1812, passed an act to promote privateering associations, to whom corporate privileges were given, for the purpose, as Chancellor Kent tells us, of

"annoying the enemy and injuring their commerce."* It may be said, and with great probability, that hostilities conducted by buccaneering companies are not likely to furnish edifying examples of forbearance. But they can only plunder, and imitate successfully Her Majesty's cruizers. Both are stimulated by booty. The comparative degrees of eagerness we need not investigate.

The Paris declaration binds only those who were parties to it. It therefore does not bind the Americans; neither would it bind this country in a war with them.

Enemy's goods safe under neutral flag.

5. The second "solemn declaration," the most important of all, was a prodigious advance in maritime law reform. The ancient *Consolato del Mare* had declared, more than six centuries ago, that merchandize belonging to an enemy was confiscable, though found in the ship of a friend. This harsh rule, unless qualified by treaty, was invariably enforced by the English Prize Court, though it was not always followed by the Continental states. But it has been reversed and extinguished by the Congress of Paris. The change is pronounced by M. Hautefeuille to be a mighty triumph of civilization over what he calls the "ferocious maxims of the middle ages;" and it is thus justified by Lord Clarendon:—

In the course of the last two centuries, one hundred and thirty international engagements have

* 1 Comm. 98.

been made between the principal powers of the world, in all of which, with eleven exceptions, the rule, "Free ships, free goods," is contained. What I deduce from that is, that in time of war, and in the heat and animosity of war, men lay aside this principle and resort to extreme and violent measures; but that when at peace, and under the influence of reason and judgment, they never hesitate to declare that that should be the rule of civilized nations.

Every other maritime power in the world has protested against our practice, and at the commencement of the Russian war, England was the only power which upheld the right of seizure.*

The words which have introduced this important revolution are the following:—

The neutral flag covers enemy's goods, with the exception of contraband of war.

A death-blow is here given to the authority of many valued judgments of the Prize Court, and many cherished doctrines of the jurist; which are wholly swept away if we suppose the second "solemn declaration" to be binding.

Lord Derby's apprehensions.

6. Lord Derby has serious misgivings as to the working of the second "solemn declaration." He thus expresses his apprehensions:—

"I confess that I regret—and I expressed my regret at the time,†—the sacrifice which as I thought

* Hansard, 22 May, 1856.
† Ibid.

my noble friend * had made in 1856, when he consented on the part of the government of this country to the principle that enemy's goods should be safe on board neutral vessels. I thought this a dangerous concession for a country situated as ours is; and I remonstrated against it." †

Lord Palmerston's good auguries.

7. Lord Palmerston, on the other hand, forebodes no evil from what was done at Paris. According to his Lordship, "the idea that the results of war depend upon the capture of an enemy's goods on board of neutral bottoms can only originate in a mind wholly unacquainted with the most familiar lessons of history." ‡ Alluding to the fact that Queen Victoria had at the beginning of the Russian war, in March, 1854,§ waived her right to seize enemy's goods in neutral vessels, — Lord Palmerston, in his Liverpool speech, on the 7th November, 1856, stated that while the effect of the waiver was not "in any degree to impair the power of the belligerents against their opponents, it yet tended to mitigate the pressure which hostilities inevitably produced upon the commercial transactions of countries that were at war." ||

Case put by Lord Derby.

8. The following imaginary but trying case was on the 7th February, 1862, put by Lord Derby:—

* Lord Clarendon.
† *Times*, 7 Feb. 1862.
‡ *Star*, 6 Feb. 1862.
§ *Infrà*, p. 99.
|| *Times*, 8 November, 1856.

"If we had gone to war with the Federal States, I will ask, in passing, what would have been the result of our adoption of the doctrines of the congress? We had an agreement—I won't call it a convention—with France. We had no agreement with America. In the event of a war with America, therefore, American merchandize on board a French vessel would, by our obligations with France, be safe against our cruizers; and American commerce would enjoy impunity when carried on in French vessels, owing to an agreement in which America had no part. Thus the treaty would have a very one-sided operation, and one nation would secure all the benefits without being a party to it, while the other would sacrifice all its advantage, because she *was* a party to it. That is a position in which England ought not to stand towards any country whatever." *

Answer by Lord Granville.

9. Earl Granville answered by showing the course which Great Britain would take under the new regime. His Lordship said:—

"I think the noble earl was not quite right in the illustration he gave of the effect of allowing neutral ships to carry the goods of belligerents. If a war arose with the United States, I have no doubt that our first operation would be to blockade, and that in a very efficient manner, all the ports of that country, thereby putting a considerable and speedy check upon the American trade. And so far from its being a disadvantage that any commerce which she carried on should be carried on in neutral bottoms, it would be quite the reverse."

* *Times*, 7 Feb., 1862.

10. The third "solemn declaration" of the Paris Congress is that—

Neutral goods safe under enemy's flag.

Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

Here no change is introduced so far as this country is concerned; for it was ever the English and American practice to respect neutral property in hostile ships. The ships indeed were captured, but the goods of the friendly owner were uniformly surrendered to him. In this respect the practice of some Continental states differed from our own; but the difference is only matter of history, and need not be gone into; the new jurisprudence of Europe on the high seas now being that the neutral flag protects an enemy's property; and that neutral property is safe, though found under an enemy's flag.

11. We now come to the fourth and last "solemn declaration" of the plenipotentiaries, namely, that—

What blockades bind by the Paris declaration.

Blockades in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

On the subject of blockades we have already said enough.* The "solemn declaration" does

* See *suprà*, p. 27.

alter the law as laid down by approved authorities.

Variance by Queen's proclamation.

12. The Queen's proclamation* charges her subjects to abstain from "breaking, or endeavouring to break, any blockade, lawfully and actually established by, or on behalf of, the contending parties"; but it does not say that such blockade "must be effective—that is to say, maintained by a force sufficient really to prevent access to the coasts of the enemy."

This variance is not likely to have been accidental. Those who drew up the Queen's proclamation must have had before them at the time the Paris declaration. The deviation, therefore, was by design and for a purpose—possibly the laudable one of adhering to precedents; seeing that America was no party to the Paris declarations. Foreign critics, however, resort to a less charitable construction; for they more than insinuate that the effective blockades described by the plenipotentiaries are viewed with disfavour by the British Government.

Section IX.

Proposed Changes in the Maritime Law of Nations.

Ought private property to be respected at sea?

1. After the great step taken by the Paris plenipotentiaries, in 1856, the question remains

* *Infrà*, p. 91.

—an important and a difficult one—whether a further stride in the same direction has not become expedient; in other words, whether it is not fit to put an end at once to the practice which, as has been shown, prevails during war, of attacking and plundering the property of private individuals at sea. Some think a change in this respect imperative; others hold it would be dangerous. On what principle are we to proceed—the good of England, or of the world at large? Is it clear that they differ? The eye of the publicist looks to the great family of nations, having regard to what is best for mankind. The municipal lawyer thinks of nothing but the interests of his own country. The statesman must decide.

If wars could be prevented or arranged by arbitration,* the gain would be immeasurable;

* The Paris plenipotentiaries received with great favour a suggestion much urged by Lord Clarendon, that friendly mediation ought in all cases to be resorted to before commencing hostilities. This appears by the Protocol of the 14th April, 1856, from which we extract the following passages :— Protocol as to mediation to prevent war.

"The Earl of Clarendon having demanded permission to lay before the Congress a proposition which it appeared to him ought to be favourably received, stated that the calamities of war were still too present to every mind not to make it desirable to seek out every expedient calculated to prevent their return ; that a stipulation had been inserted in Article VII. of the Treaty of Peace (of 1856), recommending that in case of difference between the Porte and one or more of the other signing powers, recourse should be had to the mediation of a friendly state before resorting to force. The first plenipotentiary of Great Britain conceived that this happy innovation might receive a more general application, and thus become a barrier against conflicts which frequently only break forth because it is not always possible to enter into explanation and to come to an understanding. He proposed, therefore, to agree upon a resolution calculated to afford to the maintenance of peace that

but before any hope of such happy results can be relied upon, human nature, we fear, must undergo a change, of which the indications as yet are only partial and feeble, if not hollow and deceitful. Therefore it is, that a strong effort should be made to render an evil so difficult to avert as contracted in the range of its mischiefs as possible.

America always for immunity.

2. Now it has been said, and said with plausibility, that war ought to be the affair of governments, not of individuals or even of nations. We presume that this was Lord Palmerston's meaning when he said, at Liverpool, that "it was,

chance of duration hereafter, without prejudice, however, to the independence of governments. Count Walewski declared himself authorised to support the idea expressed by the first plenipotentiary of Great Britain; he gave the assurance that the plenipotentiaries of France were wholly disposed to concur in the insertion in the Protocol of a wish which, being fully in accordance with the tendencies of our epoch, would not in any way fetter the free action of governments. The Earl of Clarendon replied, that each power is, and will be the sole judge of the requirements of its honour and of its interests; that it was by no means his intention to restrict the authority of the governments, but only to afford them the opportunity of not having recourse to arms whenever differences might be adjusted by other means. The wish of the Congress should allow of the most general application; he observed that if the good offices of another power had induced the government of Greece to respect the laws of neutrality, France and England would very probably have abstained from occupying the Piræus with their troops. He referred to the efforts made by the cabinet of Great Britain in 1823, in order to prevent the armed intervention which took place at that time in Spain. Whereupon the plenipotentiaries did not hesitate to express, in the name of their governments, the wish that states, between which any serious misunderstanding may arise, should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly power.

The plenipotentiaries hoped that the governments not represented at the Congress would unite in the sentiment which had inspired the wish recorded in the present Protocol.

perhaps, to be desired that conflicts should be confined to the bodies acting under the orders and directions of the respective states."* On one occasion the distinction between an armed enemy and a pacific trader was mutually guaranteed by treaty; a treaty which on this account deserves honourable mention—that between America and Prussia in 1785.† And here we must remember that the Americans, ever since the declaration of their independence, and more especially since the commencement of the war of 1793, have uniformly insisted "that public ships should not capture any merchant vessels, or otherwise plunder private property upon the ocean; but confine their belligerent operations exclusively to the ships of war of each nation."‡ It appears, indeed, that so recently as June, 1861, the minister of the United States at Paris proposed to the French Government "to add to the first article of the Declaration of 1856, the plan of protecting private property on the sea from capture in time of war." § How far this is practicable, how far it is wise, must soon be decided. It is, at all events, opposed by the jurists, who hold

* *Times*, 8th Nov. 1856.

† During war certain favoured persons are authorized to trade with the enemy. Others do so without licence—by connivance. This shows that convenience is felt from the practice on both sides; and it would rather appear that there is but little wisdom in restricting it.

‡ Rush's Residence at the Court of London, Sec. Ser., vol. ii. p. 124.

§ Correspondence respecting International Maritime Law. North America, No. 3. Presented to Parliament, 1862. P. 7.

that the very notion of war necessarily implies a cessation of all commercial intercourse between the belligerents.

Opinion of Napoleon I

3. The first Napoleon, a man of speculation as well as of practice, dissented from the jurists. He held that "belligerents ought to wage war without giving rise to the confiscation of their mercantile marine. Commerce should be carried on by sea between the two belligerents as it is carried on by land in the midst of the battles of the contending parties." *

Of Lord Palmerston.

4. So Lord Palmerston, no enthusiastic innovator, addressing the Liverpool Chamber of Commerce, on the 7th November, 1856, said :—" It has been a subject of great satisfaction to us † to reflect, that at the commencement of the Russian conflict, the goverument of England, in concert with that of France, made changes and relaxations in the doctrines of war, which, without in any degree impairing the power of the belligerents against their opponents, maintained the course of hostilities, yet tended to mitigate the pressure which hostilities inevitably produce upon the commercial transactions of countries that are at war. I cannot help hoping that those relaxations of former doctrines which were established in the beginning of the war, practised during its continuance, and which have

* Quoted by Mr. Lindsay in a Letter to Earl Russell.

† His Lordship was then, as now, Chief Minister.

been since ratified by formal engagements, *may, perhaps, be still further extended*; and in the course of time those principles of war which are applied to hostilities by land may be extended, without exception, to hostilities by sea; so that private property shall no longer be the object of aggression on either side. If we look at the example of former periods, we shall not find that any powerful country was ever vanquished through the losses of individuals. It is the conflict of armies by land, and of fleets by sea, that decides the great contests of nations." * It took the Saxons 150 years of murderous and devastating raids to establish themselves in this island. One pitched battle, that of Hastings, completed the Norman conquest in a day.

What the policy of Great Britain.

5. The country which has the greatest naval force has also the greatest trade, and the largest amount of property afloat. Consequently, the losses of that nation may, peradventure, be greater than her captures, regard being had to the difficulty which the most effective navy will experience in protecting countless merchantmen on every sea. This difficulty will be increased if we suppose the country to be at any time in danger of invasion, and the navy to be required for the protection of her coasts. It may, therefore, be the policy of that nation to join in establishing a universal immunity for merchant ships and their

* *Times*, 8th November, 1856.

cargoes, whether neutral or belligerent, during hostilities, so as to save them at once from the depredations of cruizers and the obstructions of blockades. If, however, blockades were reconcileable with the universal immunity desired by merchants and shipowners, then England would be safe, for she could blockade her enemy's ports, so as to destroy his trade, while at the same time her own commerce might proceed without interruption.*

Opinion of the mercantile body.

6. Judging from the resolutions of chambers of commerce, and from the evidence taken before the Shipping Committee,† it is plain that the mercantile body desire this large immunity. Mr. A. Gilmour is "for doing away with captures entirely." Mr. S. R. Graves "sees no reason why private property should be confiscated at sea, and on land allowed to go free." He holds that "England's commerce has become so large that she cannot protect it." Mr. A. Anderson is of opinion that "it would be very desirable if England could make a step further in advance and proclaim that all private property should be exempt from capture at sea." Mr. T. E. Smith thinks "it would be very desirable if we could get all private property exempted from capture in case of war." And Mr. J. Beazley is still more emphatic, for

* See *Saturday Review*, March 15, 1862. But see the remarks of Sir R. Palmer, *infrà*, p. 84.

† House of Commons, Session 1860.

he says:—"Do away with the right of capture, or ruin our British shipping—one or the other." *

7. The question, however, is not to be decided by merchants and shipowners. We have the report of a committee of the House of Commons, † who affirm that— Report of Commons' Committee.

"Though grave objections have been urged by high authorities against any further step in advance, they (the Committee) are of opinion that in the progress of civilization and in the cause of humanity, the time has arrived when all private property, not contraband of war, should be exempt from capture at sea; and Great Britain is deeply interested in the adoption of this course."

8. The Secretary of State for Foreign Affairs, having been asked, on the 18th February, 1861, whether any steps had been taken by the Government to carry out the recommendations of the Shipping Committee, gave an answer which shows that Earl Russell, though a reformer, pauses a little before adopting a principle which may be found in practice less beneficial to this country than acceptable to others. His Lordship treats the committee's proposition as somewhat Utopian. He says:— Opinion of Earl Russell.

"The proposition itself seems to me to be one of the utmost magnitude. It is in fact a pro-

* Report of Commons' Committee on Shipping, 1860.

† There were on this Committee, besides very eminent merchants (including Mr. Baring), two cabinet ministers, Mr. Milner Gibson and Mr. Cardwell; and also Lord Lovaine.

posal, that, there being two powers, one of which has a very strong army and a weak navy—the other having an army inferior in numbers, but a superior navy—the power which has the superior navy should forego all the advantage to be derived from that source, and allow the contest to be decided by military force alone. Its adoption would in the next place tend rather to prolong than to shorten wars; because one way in which a great maritime power can act as a belligerent, is to cripple the trade of its opponent. The greater its strength as a maritime power, the greater is its power to do this, and the better its chance of bringing the war to a favourable termination. If this proposition were accepted, the whole of the power would be gone which has hitherto rendered Great Britain so formidable at sea. In the next place, I perceive difficulties in detail which would be insurmountable. The mercantile navy of a belligerent would be free from capture; but no one could say, when a number of vessels, apparently merchant ships, appeared off the coast, that they might not be used for purposes of war, and that they did not contain —— [Here his Lordship was interrupted by Mr. Bright, but on resuming, said,—] I regard the question as one affecting the whole maritime power of this country. And I think that any minister of the Crown ought to be most cautious in taking any final step in respect of it."

These considerations are truly serious. The subject calls for greatly more discussion than it has hitherto received. The Legislature has not examined it; and the press has not yet

sufficiently aroused to it the attention of the country.

9. I believe I have now done fairly what I proposed at the outset, which was, to state shortly the chief points,—to offer here and there a suggestion,—and to leave to the reader's judgment the decision. Conclusion.

Section X.

POSTSCRIPT.

Shewing the Present State of Sentiment in the House of Commons as to Securing an Immunity for all Private Property at Sea, during Hostilities.*

Mr. Horsfall's motion to abolish mercantile captures.

On the 11th of March, 1862, Mr. Horsfall † called the attention of the House of Commons to the subject of international maritime law, and moved a resolution that the existing state of that law as "affecting belligerents and neutrals was unsatisfactory, and called for the early attention of the Government." The real object of the motion was to obtain a discussion of the subject. After describing the old law, and the changes made at Paris in 1856, the honourable member stated his own view to be that all private property during war should be inviolable at sea.

His opinion.

"The question was, first, what would be the effect of the law in the event of war; and, secondly, what had been its effect in time of peace? Merchants would not ship a single package of goods in a vessel liable to seizure if they had the

* The speeches which follow are abridged from the *Times* of 12th and 17th of March, 1862.

† Member for Liverpool.

opportunity of shipment in a vessel not so liable. The operation of the law in the event of a war, say with France, would be that every British ship would be laid by. Neutral vessels would obtain greatly-enhanced freights; and British seamen would be drafted from British ships not into Her Majesty's navy, but into neutral vessels that could afford to pay much higher wages than had ever been or ever could be paid in our navy. This was a most serious matter for the shipowner, the manufacturer, and the country at large. But what had been the effect of the law in time of peace? On the mere rumour of war a second-class American vessel was able to get freights at a 50 per cent. higher rate than a first class British ship could obtain. English merchants were so afraid to ship their tea in British ships that they shipped in American vessels—these not being subject to capture. We must either go back or we must go forward. In case of war, ships would require a convoy. That convoy would be much better employed in fighting the enemy. Her Majesty had declared her anxiety to 'lessen as much as possible the evils of war.' The most difficult part of the question was the subject of blockade. Those whom he represented were in favour of respecting the blockade of the Southern ports. As to privateering great injustice had been done to the Americans. They would not give it up unless the great powers of Europe would consent to take the still wider ground that all private property should be free. He asked the House to adopt his motion; and he did so in the name of the commerce of the country, and of civilization, humanity, and justice."

Evil of the law in war.

In peace.

Difficulty as to blockade.

The Attorney-General * addressed the House

The Attorney-General's opinion.

* Sir William Atherton.

in an able speech, but rather with the view of expounding and vindicating the law as it now stands than of discussing the merits of the changes proposed, or the effect which they were likely to produce on the general interests of the country. He held that the Declaration of Paris was a concluded fact.

Paris Declaration final.

Mr. Liddell's opinion.

Mr. Liddell * denied that the importance of this subject was confined to the shipping interest.

"The doctrine which lay at the root of our present maritime law was that a strong belligerent should by means of its supremacy at sea harass and weaken the enemy. But by admitting foreigners to our colonial and coasting trade we had rendered it impossible for us in future to act upon that principle, without in time of war handing over the whole of our commerce to the ships of other countries. For these reasons we must recognize and forward the principle of granting immunity to private property at sea. We should invite a Congress to promote the general progress of commerce, and to consider how best to protect the property of unoffending shipowners from rapine and destruction."

We should support immunity.

Mr. B. Cochrane's opinion.

Mr. Baillie Cochrane † censured the Declaration of Paris as a great blunder. But he should regard the adoption of the motion before the House as a still more unfortunate event.

Paris Declaration a blunder.

Sir Geo. Bowyer's opinion.

Sir George Bowyer ‡ said it was difficult to

* Member for S. Northumberland.
† Member for Honiton.
‡ Member for Dundalk.

understand why the analogy of terrestrial war should not prevail with respect to war at sea. A belligerent had no more right to seize a merchant's ship on the sea than he had to seize the property of the people whom he invaded by land.

Analogy between sea and land warfare.

Sir George C. Lewis * said the question was of first-rate importance; and it was of paramount importance that it should receive a right decision in that House.

Sir Geo. C. Lewis's opinion.

"Neutrals have no interest in the principle which the honourable mover recommends to the House. Neutrals, so far as they had any interest, had an interest directly opposite, because if they wished to become the carriers of the world, they would naturally wish that the ships and goods of the belligerents should be exposed to risk. You may make a compact that in time of war you will respect the neutral flag. For instance, we have now a compact with France and other continental powers that we will act on the principle that the neutral flag covers the enemy's goods, so that if we were to seize American goods under the French flag we should be guilty of a violation of engagement with France. But war puts an end to all treaties and engagements in the nature of a treaty. Therefore if we had unfortunately found ourselves involved in hostilities with the United States, and if we had previously had a treaty with the United States recognizing the principle that belligerents were to spare one another's mercantile marine, the very act of war would have put an end to that

Neutrals opposed to the motion.

War puts an end to treaties.†

* Secretary of State for the Department of War.
† Wheaton's Elements, 340.

treaty; and it would have been in the discretion of either power whether or no they would act on that principle. It is an absurdity to suppose that if we were at war with France or Russia the Declaration of Paris would have any binding effect upon us except in regard to our honour. It is not binding by international law. If the United States of America approve so highly of the principle of not capturing enemy's ships and goods, why don't they establish that principle with respect to the Southern States? Here is a fine opportunity for the Government of Washington acting on that principle. No doubt it is said that the Southerners are rebels; but in the exchange of prisoners, and in the matter of blockades, they have been treated in all respects as belligerents. If that be the case, why does not the Government of Washington show its forbearance in not capturing enemy's goods? It is said that all private property is spared in land warfare. I must meet that assertion by a most formal denial. I say that by the laws of land warfare, as recognized by the most civilized nations, and according to the most recent practice, private property is not respected except so far as suits the present convenience of the belligerent armies.* When you conquer a country, you conquer its government; and when you have conquered its government, you have conquered that agent by which the country can be plundered. Perhaps this language might be somewhat homely; nevertheless, it expressed the exact truth. With regard to the sea, there was no similar engine; and the only way in which a belligerent could exercise any control over pro-

Property not spared on land.

* Here the right hon. gentleman gave an account of the Duke of Wellington's proceedings in Spain; not a hostile country, but a country we were assisting.

perty at sea was by capture. The real analogy between land and sea warfare was effected by the Declaration of Paris when this country abolished privateering. We do not permit a single private individual to go out on a plundering expedition. At the same time we do not restrain the army from seizing private property whenever such seizure may be necessary. With our fleet at Portsmouth or Plymouth, to allow enemy's ships to go in and out free from capture seemed to be carrying the doctrine of forbearance in time of war to an absurd point."

Mr. T. Baring had listened with some surprise to the speech of the right honourable gentleman the Secretary for War (Sir George Lewis), who had said that no compact or treaty made during peace was binding in war.

Mr. T. Baring's opinion.

Sir G. C. Lewis (interrupting) said:—

Sir G. C. Lewis's explanation.

"This is so important a point that I should be sorry if any misunderstanding arose. What I meant to say, and what I believe I did say, was that I conceived the Declaration of Paris to be binding as between this country and neutrals during the existence of war; and to be equally binding with a treaty though it was only a declaration; but that if we were at war with any of the parties to that declaration, then, like other treaties, it would cease to have a binding effect as regards that belligerent."

Mr. Baring resumed, and made the following observations:—

Mr. Baring's opinion.

"The Attorney-General had treated the Paris Declaration as an accomplished fact, which must

Paris Declaration binding.

be adhered to. In the case of a war between this country and France, is it not evident that the whole of your carrying-trade would pass into the hands of neutrals? What country has most commerce afloat?—most property to be seized? Surely, England. What country would gain most by the preservation of that property? England. What country would be so much injured in war, through her commerce, as England? There is not the slightest doubt that you ought gravely to consider the motion before us. He did not see why a Congress should not meet and discuss this question, in the interest both of commerce and of Europe. He firmly believed the principle of this motion would prevail, although it might be resisted by the present Administration; for he felt confident that the time would come when the House would not turn a deaf ear to the prayer addressed to it by the great majority of the commercial interests of the country."

Principle of freedom must prevail.

Adjourned Debate, March 17.

Mr. Lindsay's opinion.

Mr. Lindsay,* in consequence of the indisposition of Mr. Cobden, resumed the adjourned debate.

"In the event of a war, it being clear that all our merchandize would be sent from our shores in the ships of other nations, it was equally clear that our shipping would be obliged to lie in our harbours completely unemployed; so that the argument that we required our fleet to protect our commerce and shipping fell to the ground. In the event of a war with France, the merchandize of that country would be conveyed in neutral bot-

* Member for Sunderland.

tons, so that our fleet would be of no value in the way supposed. Vast changes had taken place since the last great war. In 1814 the total amount in value of our imports and exports was about 60,000,000*l.* The value in 1860-61 was close upon 300,000,000*l.* Our shipping in 1814 was about 1,000,000 tons; it was now near 5,000,000, of which 500,000 consisted of steam-ships. Did anybody really suppose that we could have a fleet sufficiently numerous and powerful to protect that vast commerce? If the cry in war was to be 'burn, plunder, and destroy,' we had more to lose than any other nation; and, in the event of war, would be by far the largest sufferers."

Our fleet could not protect our commerce.

The Lord Advocate of Scotland* delivered a clear legal speech, in course of which he asked a question not yet clearly answered, namely: What was to become of blockades, supposing the views of the honourable mover carried?

The Lord Advocate's opinion.

"The principles advanced by the supporters of the resolution would necessarily lead to the abolition of blockades. The rules of war entitled us to destroy our enemy's commerce. If we gave up that right, could we then maintain the right of blockade? which was an infinitely stronger interference with private property than the right of capture by sea."

Effect on blockade.

Sir Stafford Northcote† doubted whether the amount of our warehousing-trade and the extent to which our carrying-trade would be endangered, in the event of war, had been sufficiently considered.

Sir S. Northcote's opinion.

* Mr. Moncrieff, Member for Leith.
† Member for Stamford.

Neutrals could not now be put down.

"The phenomena of the last war had been spoken of. But Great Britain would not be able to put down neutrals now. Many close trades which then existed were now thrown open—our colonial trade for example. Commerce always sought the safest ships, and English vessels were then the safest. But the neutral and not English vessels would now be the safest. A war with France would threaten our very existence. Both sides would have recourse to neutral vessels. This would cause little injury to France, but the effect on England would be ruinous. Were Her Majesty's Government of opinion that this matter could safely rest where it was? They had rashly concluded certain arrangements with certain powers; while the most important power stood aloof. France would be perfectly safe. All that would be stopped would be British shipping. The Government would surely not contend that this treaty might be set aside. Did the noble lord at the head of the Government adopt the doctrine that this treaty might be broken as between the nations who might go to war? He apprehended great inconveniences and dangers from the treaty of Paris. In addition to a war with France, that treaty would probably bring us into difficulties with the United States. He thought it impossible to accept the principles laid down by the noble lord at Liverpool, without considering a great many other questions. They all knew that there were stipulations and treaties which war immediately put an end to; but were all treaties made even in contemplation of war to be set aside? If so, they were going back to a state of barbarism. Chancellor Kent said, that if a treaty contemplated a state of future war, it preserved its force when the rupture took place; and the obligation of keeping faith, so far from

Could matters rest as they were?

The Paris Declaration binding.

being extinguished, became increased, from the increased necessity for it. That was a matter which ought to be cleared up; whereas it was now left in studied vagueness. They had been told that there was no protection for private property on land. The advocates of the Danish claims would be rather startled at such a change of opinion on the part of the Government. The opinion of Her Majesty's Attorney-General and of the Chancellor of the Exchequer, last year, was that the claimants who had lost property on land were entitled to have their losses made good; but that there was a broad distinction between property taken on land, and property taken on sea; and that compensation for the latter was not to be given. But what did the Secretary for War* tell them? Why, that this distinction could not for a moment hold water. He had seen it stated that there was a better reason assigned for maritime plunder—that it was more out of sight and caused less indignation than plunder by land.† There was some truth in that. He did not ignore the humanitarian argument; but, speaking as an Englishman, he thought that the interests of his own country were of all things to be considered. He was not prepared to endorse the views propounded by his honourable friend the mover until he saw more distinctly how they could be accommodated to the other questions in connection with the subject which they had raised. The advice which was given by Baillie Nicol Jarvie, or rather by his father, to the effect that one should never put his arm out so far that he could not draw it back again, was, he thought, quite applicable under the present circumstances."

Property safe on land—opinion of law officers.

As an Englishman, he would support the motion.

* Sir George Lewis.

† See *suprà*, p. 11.

Mr. Gower's dissent.

Mr. Gower* dissented from the motion.

Mr. Cave's assent.

Mr. Cave† expressed his general concurrence with the views of the mover.

Sir F. Goldsmidt's opinion.

Sir F. Goldsmidt‡ observed that the resolutions of the honourable member for Liverpool would not mitigate the real horrors of war.

"Their only effect would be to relieve our merchants from a somewhat higher rate of marine insurance in time of war. Wars would be best prevented by a firm and temperate policy. Their hardships were unavoidable. But those hardships would be aggravated by our surrender of the right of maritime capture."

Captures not to be relinquished.

Lord H. Vane's opinion.

Lord Harry Vane§ hoped that the motion would not be pressed to a division, though he admitted that the present state of maritime international law was extremely unsatisfactory.

Law now unsatisfactory.

Mr. Buxton's opinion.

Mr. Buxton || supported the motion. He said that

The motion would improve blockades.

"If the proposition now made were agreed to, we should be able to blockade an enemy's ports with far greater efficiency than at present.¶ We should be able to concentrate our fleets upon the enemy's coasts. At the same time, our enemy, not being equal to us in naval force, could not blockade our ports. His navy would be practically useless to him."

Mr. Newdegate** said that when the Paris

* Member for Bodmin.
† Member for Shoreham.
‡ Member for Reading.
§ Member for Hastings.
|| Member for Maidstone.
¶ What greater interruption to commerce can be imagined than blockades? See the Lord Advocate's speech, *supra*, p. 71.
** Member for N. Warwickshire.

Declaration came to be tested by war, he was afraid that this country would be sorely tempted to set it aside. He trusted that the practical character of the English people would guard them from the delusion of perpetual peace; remembering how many prophecies on this subject had been falsified in the last twelve years.

Mr. Newdegate's opinion.

Paris Declaration not binding.

Mr. Massey* agreed that the state of international law was unsatisfactory.

Mr. Massey's opinion.

"Formerly, belligerents carried on war in a form so harsh and oppressive, that neutrals suffered almost as much as the enemy, and protested against the tyranny to which they were subjected. This country had sometimes pressed too heavily on neutrals. But it had now gone to the other extreme; and, by a sort of self-denying ordinance, had transferred to the neutral the whole advantage. The old system of convoys for merchant ships was exploded. No war hereafter could be greatly protracted. Our shipowners were treated with derision, as though they were unduly obtruding themselves and their interests. The answer they received was, 'You must submit to the exigencies of war. It is selfish of you to interpose when great interests are at stake.' That was strange language. When we spoke of war, we always had in mind the possibility of a war with France, in which event we should immediately blockade the French ports; and her merchant shipping would immediately disappear from the seas. But then the large war-navy of France would prey upon the residue of our commerce, not absorbed by neutrals. He could conceive nothing more to

Law now unsatisfactory.

A self-denying ordinance.

* Member for Salford.

the interest of this country than to go to the length which this motion recommended, and thus render the Treaty of Paris complete and consistent. It had been denied with great emphasis, that in time of war there was any respect for private property on land. That was a new doctrine to him. There was nothing better established than the striking difference between the mode of carrying on war by land and by sea. No country was ever brought to terms of peace by the destruction of its commerce. The military glory of France culminated to its highest point after her flag had disappeared entirely from the seas. It had been said that a treaty might be abrogated by war. But to say that a treaty, specially providing for the exigencies of war, should be annulled in war, would be to represent the powers who were parties to it, as acting like children. If one of these powers should attempt to break it, a power so faithless would be visited by the condemnation of Europe; and no advantage would be gained by infraction of the treaty."

The motion would complete the Paris Declaration.

War by land and by sea different.

Treaty contemplating war binds in war.

Mr. Bentinck's opinion.

Were we bound by the Paris Declaration?

Mr. Bentinck* desired to know whether the House or the Government meant to say that this country would be bound by the Declaration of Paris in the event of war. He would ask his honourable friend not to press his resolution.

Mr. Bright's opinion.

Mr. Bright† remarked, that when the Russian war began, the Government advised the Queen to issue the Proclamation ‡ to which reference had been made more than once.

"That Proclamation did precisely what the

* Member for West Norfolk.
† Member for Birmingham.
‡ See *infrà*, p. 91.

Declaration of Paris two years afterwards did for all future wars, should such arise. It was found that the old policy was impossible. Unless you could blockade every port of Russia, American mercantile ships would carry on trade with that country as before the war; and if they had Russian cargoes in those ships, the Americans would not have permitted—he spoke advisedly—without remonstrance, and probably without resistance, the exercise of a right of search, and the taking from them the property of Russia, then the enemy of England. If the Government had not taken the course which they did by the Queen's Proclamation of 1854, in six months, or less, we should have been involved in a serious discussion with the United States, which might have ended in adding to the calamity of the then existing war with Russia, the calamity of a war with the United States. He held this, after considering the matter, that the course taken by the noble lord *—for he was Prime Minister in 1856 when the Congress met at Paris—was one which he could not have avoided; and, as it had become inevitable, it was irrevocable now. The Liverpool Chamber of Commerce, in a petition which they presented to this House, said that such a proposal as that of the honourable member for Liverpool would shield the shipping interest of this country from greater injury than the fleet of any maritime power could inflict on them in time of war. He agreed that it was wrong to use such language as had been used with respect to the shipping interest, he did not say within the walls of that House, but out of doors. Surely the shipping interest had as great a right to be considered, as the great

The old policy untenable.

The Americans would have resisted search.

Paris Declaration unavoidable and irrevocable.

* Lord Palmerston.

cotton-spinners or the land-owners, or any other great class in the country. The proposal, therefore, of the honourable member for Liverpool was one which could not be got rid of by the off-hand declaration of a minister, however influential. The proposal was a very simple one. It merely said, you have freed the cargo, why not include the ships? He anticipated that, instead of provoking war, this proposal would render its occurrence less probable; while, if, unhappily, it did arise, it would be likely to be brought to an earlier termination. At all events, it must be admitted, the proposal was humane and beneficial; and one which followed as a necessary consequence of the Paris Declaration. The Secretary for War * had made a speech which he had heard with great surprise and regret. What was it that the jurist Wheaton said on the question as to the fate of treaties in time of war? He said that when treaties were meant to provide for war, it would be against every principle of just interpretation to hold them extinguished by war. So Dr. Phillimore said, that the general maxim that war abrogates treaties, must be subject to limitation in one case, namely, the case of treaties which provide for the breaking out of war between the contracting parties. But what was done at Paris in 1856 was not an ordinary treaty, but the general concurrence of the civilized nations of Europe, enacting a new law which should be admitted and accepted in all future time—an agreement which he undertook to say, if the Government ever attempted to break, they would call down upon themselves the condemnation of every intelligent man in every intelligent country of the globe."

The proposal a sequence to the Paris Declaration.

* Sir George Lewis.

The Solicitor-General * addressed himself, not only to the commercial interests likely to be affected by the proposed change, but also to those moral and patriotic considerations which, though less evident, are deeply involved in the discussion. He said:— The Solicitor-General's opinion.

"Two arguments were drawn from the Declaration of Paris. In the first place, it was said that there were no reasons in favour of the propositions there laid down which did not equally apply in favour of the proposition of the hon. member for Liverpool. The second argument was, that the effect of the Declaration of Paris would be to transfer a large portion of the carrying trade to neutrals, and to inflict serious injury on our shipping trade, and on our mercantile interests generally. Those two points embodied the sum and substance of almost all that had been said. The first of those arguments it was not difficult to dispose of. It was easy to show that there were reasons, clear and solid, for that portion of the Declaration of Paris, as to giving up the right to take enemy's goods out of neutral ships, which would not, in any degree whatever, apply in favour of the proposition to allow enemy's goods on board enemy's ships, or enemy's ships themselves, to go free. Neutrals were in a position which, on grounds not only of common justice, but of the mutual interest of belligerents, entitled them to great consideration. The annoyance and disturbance of neutrals by visiting and searching their ships, by interference with their trade, by taking violently away from their ships goods which they had legally and justifiably admitted on board,—all these were acts Two arguments. The Paris Declaration did not support this motion.

* Sir Roundell Palmer, who has revised this speech.

Neutrals had the strongest claim to consideration.

in a high degree injurious to persons who had the strongest claim on the consideration of nations in amity with them, though at enmity with each other; and at the same time tended, in a high degree, to involve those nations in war with neutrals, and to draw neutrals, however unwilling, into the contest. Thus there were various reasons why concessions should be made to neutrals, many of the most important nations of Europe, as well as the United States of America, having, in fact, long previously made treaties bearing on these questions. But it would be seen that these reasons did not in any way operate in favour of making the same concessions to belligerents. The second argument, as to the transfer of the carrying-trade to neutrals, was much more important, and involved considerations of much greater difficulty. It must never be forgotten that governments and nations had to deal with a balance of evils and inconveniences. The particular evils which it was supposed would arise from the operation of the Paris Declaration in favour of neutrals he hoped and believed were greatly exaggerated. But the House would permit him to put before it the other side of the question, and consider what were the evils that might arise from the adoption of the principle recommended by the hon. member for Liverpool. Now, it had been said that it was of no use to refer to the old-established law of nations, for that we had introduced a new principle by the Declaration of Paris. But that he denied. We had given up certain belligerent rights, but had introduced no new principle. But this motion asked us to give up principles hitherto of cardinal and fundamental importance in the law of nations. If there were any principle of the law of nations more cardinal than another, it was that in war

Not so belligerents.

The concession to neutrals would do little harm.

It was not a new principle.

governments were identified with their people—that you could not make war upon the government and have peace with their people—that the people were bound up with the government and the public interests of the nation, for better or worse. This principle involved in itself the very highest and most momentous considerations—the interests of patriotism and the interests of peace. He dreaded to think what might be the effect of admitting the principle of a political war and a commercial peace. If anything could sap the patriotism of a nation, it would be such a state of things. The merchants of England had on many occasions shown their patriotism. But under what system had that patriotism been fostered and maintained? Was it not a system that in war bound up the English merchants with their Government, which made them follow-sufferers in its reverses, partners in the common stake, and looking to its success as the source or return of their own prosperity? But he ventured to say that the patriotism of the mercantile class would be placed in danger if they were indemnified against the consequences of war, and deprived of their general interest in the maintenance of peace. What was the greatest check we had against unjust and unnecessary wars? Was it not the burdens they imposed? And if a system were introduced which would admit of carrying on war without those burdens, could it be supposed that the interest of merchants would be the same as now in preventing war, or in bringing about the restoration of peace? If the shipowners should suffer—and he should regret if they did—by the present state of the law, they certainly would not have an increased interest in the maintenance of peace, if the system of political war and com-

Danger of the proposed principle.

It would jeopardise the mercantile patriotism.

Suffering is war's best preventative.

mercial peace were introduced. But the effect of the change would be still more important with respect to other nations whose governments might be more likely to undertake unjust and aggressive warfare, than with respect to ourselves. What was the strongest check to wars of aggression and military ambition? It was the suffering that must thereby be entailed, and the fear that the people would not endure them. But if you made that burden light, you would be giving facilities to schemes of aggrandisement. The people would become less vigilant; and, by the continuance of trade, even the sinews of war, on which princes depended, would be more easily supplied. But it was said, that what was now asked was to reduce maritime war to the position into which the progress of civilization had brought military war. It was perfectly true that land warfare had received great mitigation; but that had taken place as much under the influence of considerations of interest as from any mere motives of humanity. The best way for an army to maintain itself was to be on good terms with the people of the country which it was occupying. The commissariat could not get supplies if we were to apply the principles of marine warfare to operations on land. But no nation had ever done that, with respect to land operations, which was now proposed as to naval warfare. No nation had entered into engagements, depriving its generals and armies of the power of taking private property by land, whenever the nature of the operations, or the exigencies of the war, might make it necessary or expedient to do so. There was all the difference in the world between a moderate use of legal powers, and the total renunciation of them. And the objects of

Leniency of land warfare.

Ground of this.

naval operations were different from those of land warfare. By sea, you endeavour to drive off the fleets and the navies—mercantile and warlike—of the enemy. Could any one say that that had no tendency to cripple him, to bring him to terms, and to produce a peace? It was evident, that, if you adopted this proposal, you would deprive naval warfare of half the field of its operations; and how could that be done without greatly reducing in war the strength and importance of a naval as compared with a military power? What would there be left for our ships to do? They would be reduced to defensive operations, and, as had been suggested, to blockades for the purpose of shutting up the armed vessels of the enemy in their ports; and, if the enemy's ships did not attempt to come out a kind of stalemate would be the result. Nor was it possible to draw a safe line, when maritime power was in question, between the armed and the mercantile marine of a nation. Even for the direct purposes of war the mercantile marine was of the most obvious importance; it was not only a nursery of seamen, but large merchant ships might be converted into ships of war; merchant ships might be taken up as transports for troops, or for the commissariat service; and, in case of an invasion, they would be more especially available. If we permitted a hostile maritime power to accumulate a great fleet of mercantile vessels, they might be turned against us with the most important results. He would now come to the point of blockade, which was so tenderly touched upon by his hon. friend the member for Stamford. The hon. member for Liverpool had said he would not interfere with blockade, and other hon. members

The proposition would weaken a naval power.

Blockade of armed vessels.

Mercantile marine formidable in war.

had said the same. It would, however, be very difficult, upon the principles of this proposition, to save the right of blockading commercial ports.

Commercial blockades.

Because what was done by blockading commercial ports? It was obstructing trade; it was destroying the business of great numbers of persons who trade with those ports, and of the inhabitants of those ports, so far as concerns their commerce with foreign nations. Is not that the very thing which was done on the seas when war was made against a mercantile marine? But he foresaw that, as soon as the proposition now under discussion was established, there would spring up an argument against blockades of this kind. What could be the use of them, it would be said, when your enemy's ships could go to a neutral port, and when, if they put into the Scheldt or Elbe, or some port of Prussia, the railroads would carry the goods over neutral countries much more easily than ships could convey them. It would therefore be said to be a most idle thing to resort to blockades, if they might thus be defeated. The Liverpool Petition spoke only of a considerable part of the trade being likely to find its way into neutral hands. That, to some extent, would no doubt be the case. But we could not expect to accomplish the objects of war without suffering serious evils; nor was it clear that it would be for the true interest of peace or civilization if we could. As to the Declaration of Paris, we were not likely to go back from it. It could hardly be supposed that the Secretary for War* had meant for a moment that we should think of receding from it. Very lately, we had been threat-

Might become ineffective.

We would not recede from the Declaration of Paris.

* Sir George Lewis.

ened with the danger of war with a power not bound by the Declaration of Paris. Was there then, among the merchants of this country, any flinching from that emergency? Did the people of England look that danger in the face as if they were afraid of ruin? No; neither from Liverpool nor Manchester, nor from any other part of the kingdom, did any such timid accents proceed. There was not the least sign, from one end of the kingdom to the other, of any apprehension that the moment we entered into the contest, with the Declaration of Paris round our necks, our power would be gone or our mercantile marine destroyed. He therefore insisted that we were not wrong in placing faith now as much as heretofore in the patriotism, the resources, and the elasticity of the country."

With it round our necks we felt serene.

Mr. Walpole* concurred generally with the views of Sir Roundell Palmer; but expressed strong dissatisfaction with the Declaration of Paris. He said,—

Mr. Walpole's opinion.

"We have abundant evidence to show that when we entered into the Declaration of Paris without the concurrence of America we put our merchants into a position which they ought not to have been compelled to occupy. Although we had the finest ships in the Chinese seas, the mere apprehension of a war deprived them of the trade to which they were entitled, and transferred it to the United States because they were not likely to be engaged in hostilities. Could such a state of things be endured without attempting to put the subject on a

Declaration of Paris mischievous.

Was it to continue?

* The Right Hon. Spencer Horatio Walpole, Member for Cambridge University.

more satisfactory footing? The hon. member for Birmingham told us that the legitimate consequence of the Declaration of Paris is that private property shall be pronounced free, even in belligerent ships. His hon. and learned friend the Solicitor-General had very justly remarked that if we carried the principle so far the same logic will lead to the abolition of commercial blockades. His object in rising was to elicit from the Government whether this one-sided declaration was to be amended and placed on a better footing."

He desired an answer.

Lord Palmerston's opinion.

Repeal of the Paris Declaration impossible.

Lord Palmerston had no hesitation in saying that to go back to the parties who assembled at Paris, and to ask them to rescind those resolutions, would be a course which no gentleman could seriously think the Government was likely to adopt, or that, if adopted, the Government was likely to get the other parties to agree to it.

The motion, no logical deduction from it.

"The proposition made by the hon. member for Liverpool, that we should agree that private property by sea should be exempt from capture was said to be a logical deduction from the Declaration of Paris. He denied that proposition. The Declaration of Paris related entirely to the relations between belligerents and neutrals. The proposition of the hon. member related to the relations of belligerents to each other. The hon. member for Birmingham had been kind enough to attach some value to opinions which he (Lord Palmerston) had expressed some years ago at Liverpool.* The attention which he had been pleased to pay, and

His lordship's Liverpool opinions.

* See *suprà*, p. 58.

the weight which he had been pleased to give, to his (Lord Palmerston's) opinion, induced him to hope that he would with him (Lord Palmerston) alter the opinion which had been then expressed. His opinion, therefore, distinctly was, that if you give up that power which you possess, and which all maritime states possess and have exercised—of taking the ships, the property, and the crews, of the nation with whom you may happen to be at war, you would be crippling the right arm of our strength. You would be inflicting a blow upon our naval power, and you would be guilty of an act of political suicide. He hoped the hon. gentleman would be content with the discussion he had raised on the question, and withdraw his resolution."

The motion suicidal.

Mr. Disraeli said that by the Declaration of Paris we had given up the cardinal principle of our maritime power.

Mr. Disraeli's opinion.

"There is a general impression that the great change made in the maritime code may be, perhaps must be, the cause of serious results to the maritime power of this country. He thought it not at all a question of the shipping interest only; it concerns the whole maritime strength of this country, if it is true that we have acknowledged the principle that the flag of a neutral covers the cargo. This must divert the commerce of the country in time of war into neutral bottoms; and that, he believed, will have dealt a serious blow to our maritime strength. It was said that on the eve of war with Russia we feared that the assertion of our old principle might involve us in embarrassments with the United States. The noble Lord

The new rule as to the neutral flag a death-blow to us.

The motion would make blockades unavailing.

recognized the accuracy of that description. How could we maintain our system of blockades, if we conceded the principle which the hon. mover recommended? If we could not maintain our blockades, it was evident that our naval power must cease to be aggressive, and exist only for purposes of defence."

Motion withdrawn.

Mr. Horsfall, in deference to the suggestions made from both sides of the House, withdrew the motion; his object having been abundantly attained by the delivery of the preceding opinions, which came seasonably, at the very moment when the "Chief Points" had been brought to a close.

APPENDIX.

THE PARIS "SOLEMN DECLARATION," APRIL 16, 1856.

THE Plenipotentiaries who signed the treaty of Paris of the 30th of March, 1856, assembled in Conference,—Considering: The Paris Declaration.

That maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents, which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point;

That the Plenipotentiaries assembled in Congress at Paris, cannot better respond to the intentions by which their governments are animated, than by seeking to introduce into international relations fixed principles in this respect;

The above-named Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn Declaration:

1. Privateering is, and remains abolished;

2. The neutral flag covers enemy's goods, with the exception of contraband of war;

The Paris Declaration.

3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;

4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Governments of the undersigned Plenipotentiaries engage to bring the present Declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof, will be crowned with full success.

The present Declaration is not, and shall not, be binding, except between those powers who have acceded, or shall accede, to it.

Done at Paris, the 16th of April, 1856.

(Signed)

Buol-Schauenstein.	Hatzfeldt.
Hübner.	Orloff.
Walewski.	Brunnow.
Bourqueney.	Cavour
Clarendon.	De Villamarina.
Cowley.	Aali.
Manteuffel.	Mehemmed Djemil.

THE QUEEN'S PROCLAMATION, 13TH MAY, 1861.

VICTORIA R.,

The Queen's Proclamation.

Whereas hostilities have unhappily commenced between the Government of the United States of America and certain states styling themselves the Confederate States of America;

And whereas we, being at peace with the Government of the United States, have declared our royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties;

We, therefore, have thought fit, by and with the advice of our Privy Council, to issue this our Royal Proclamation;

And we do hereby strictly charge and command all our loving subjects to observe a strict neutrality in and during the aforesaid hostilities, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the Law of Nations in relation thereto, as they will answer to the contrary at their peril.

And whereas in and by a certain statute * made and passed in the 59th year of His Majesty King George III., intituled "An Act to prevent the Enlisting or Engagement of His Majesty's Subjects to serve in a Foreign Service, and the fitting-out or equipping, in His Majesty's Dominions, Vessels for Warlike Purposes, without His Ma-

* 59th Geo. 3, c. 69.

The Queen's Proclamation.

jesty's Licence," it is, among other things, declared and enacted as follows: *—

Now, in order that none of our subjects may unwarily render themselves liable to the penalties imposed by the said statute, we do hereby strictly command, that no person or persons whatsoever do commit any act, matter or thing whatsoever, contrary to the provisions of the said statute, upon pain of the several penalties by the said statute imposed, and of our high displeasure.

And we do hereby further warn all our loving subjects, and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our Royal Proclamation, and of our high displeasure, to do any acts in derogation of their duty, as subjects of a neutral sovereign, in the said contest, or in violation or contravention of the law of nations in that behalf; as for example and more especially, by entering into the military service of either of the said contending parties, as commissioned or non-commissioned officers or soldiers; or by serving as officers, sailors, or marines, on board any ship or vessel of war or transport, of or in the service of either of the said contending parties; or by engaging to go or going to any place beyond the seas, with intent to enlist or engage in any such service, or by procuring or attempting to procure, within Her Majesty's dominions at home or abroad, others to do so; or by fitting-out, arming or equipping any ship or vessel to be employed as a ship of war or privateer or transport, by either of the said contending parties; or by breaking or endeavouring to break any blockade lawfully and actually esta-

* For the verbose enactments of this Act, see the Statute Book. Sir Roundell Palmer, in his speech, *infrà*, p. 95, says, "they are sufficiently set out in the title."

blished by or on behalf of either of the said contending parties; or by carrying officers, soldiers, dispatches, arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties, all persons so offending will incur and be liable to the several penalties and penal consequences by the said statute, or by the law of nations, in that behalf imposed or denounced. The Queen's Proclamation.

And we do hereby declare that all our loving subjects, and persons entitled to our protection, who may misconduct themselves in the premises, will do so at their peril and of their own wrong, and that they will in nowise obtain any protection from us against any liabilities or penal consequences, but will, on the contrary, incur our high displeasure by such misconduct.

Given, &c., 13th May, 1861.

GOD SAVE THE QUEEN.

Sir Roundell Palmer's Speech on the Effect of the Queen's Proclamation.*

Sir R. Palmer on the Queen's Proclamation.

The O'Donoghue moved for returns of the number of vessels that had, during the past six months, broken the blockade of the Southern ports of America. He complained that the British Government had not taken steps to prevent breaches of that blockade, which was not, in his opinion, to be held ineffective merely because the Americans "had not been able to accomplish an impossibility, viz. the hermetically sealing of 3000 miles of coast." The honourable Mover further insisted that the Government ought to enforce the Queen's proclamation against furnishing the belligerents with articles contraband of war.

Sir Roundell Palmer (Solicitor-General):—I think it desirable that a few words should be said to correct a total misapprehension of a matter of law, into which the hon. gentleman opposite has fallen. He implies, by the terms of his notice of motion, and more distinctly stated in his speech, that all masters of British merchant vessels who may have run the blockade with articles contraband of war on board have been guilty of illegal acts, in violation of Her Majesty's proclamation. which the Government of this country, having their attention called to them, ought to have inter-

* Revised. *Times*, 21st February, 1862.

fered to prevent, but had not done so. He has also suggested that the authorities of the port of Nassau must be subject to serious blame for having permitted ships under similar circumstances to call at that port and to take in supplies, and to have the benefit of calling and remaining there when they had on board articles contraband of war, which the hon. gentleman seemed to suppose that Her Majesty's proclamation had made it illegal for them to have on board, and which therefore they could not be permitted to carry without a violation of neutrality. In all these respects the hon. gentleman has totally misunderstood the law. This country is governed by law, and except as far as Her Majesty's Government have powers by law to control the action of private British subjects, whether masters of ships or others, of course they are perfectly powerless in the matter. The only law which enables Her Majesty's Government to interfere in such cases is that commonly called the Foreign Enlistment Act, and the whole nature and scope of that Act is sufficiently and shortly set out in the title. It is "An Act to prevent the Enlisting and Engagement of Her Majesty's Subjects to serve in Foreign Service, and the fitting out or equipping in Her Majesty's Dominions Vessels for Warlike Purposes without Her Majesty's Licence." That Act does not touch in any way whatever private merchant vessels, which may carry cargoes, contraband or not contraband, between this country or any of the dominions of Her Majesty and any port in a belligerent country, whether under blockade or not; and the Government of this country, and the Governments of our colonial possessions, have no power whatever to interfere with private vessels

Sir R. Palmer on the Queen's Proclamation.

under such circumstances. It is perfectly true that in the Queen's proclamation there is a general warning, addressed to all the Queen's subjects, that they are not, either in violation of their duty to the Queen as subjects of a neutral Sovereign, or in violation and contravention of the law of nations, to do various things, one of which is carrying articles considered and deemed to be contraband of war, according to law or the modern usages of nations, for the use or service of either of the contending parties. That warning is addressed to them to apprize them that if they do these things they will have to undergo the penal consequences by the statute or by the law of nations in that behalf imposed or denounced. In those cases in which the statute is silent,* the Government are powerless, and the law of nations comes in. The law of nations exposes such persons to have their ships seized and their goods taken and subjected to confiscation, and it further deprives them of the right to look to the Government of their own country for any protection. And this principle of non-interference in things which the law does not enable the Government to deal with, so far from being a violation of the duty of neutrality — which the Government are sincerely anxious to comply with—is in accordance with all the principles which have been laid down by jurists, and more especially by the great jurists of the United States of America. In order that the hon. gentleman may understand exactly how the case stands, I may be permitted to read a short passage from one of the works of these writers. Wheaton, who, as everybody knows, has written one of the

* The statute is silent as to contraband and blockade.

most valuable treatises on the subject that ever were composed, says :—

Sir R. Palmer on the Queen's Proclamation.

"It is not the practice of nations to undertake to prohibit their own subjects, by previous laws, from trafficking in articles contraband of war. Such trade is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of nations, or particular treaties."

Wheaton then goes on to justify the conduct of the United States in not interfering to prevent the supply of arms to Texas, then at war with Mexico, and says,—

"The Government is not bound to prevent it, and could not have prevented it without a manifest departure from the principle of neutrality, and is in no way answerable for the consequences."

Chancellor Kent, in his scarcely less admirable work, says :—

"It is a general understanding that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended, on the part of the French nation in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to

Sir R. Palmer on the Queen's Proclamation.

transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act."

I think, therefore, it is very clear that the Government at home and the colonial authorities at Nassau have taken the only course which it was possible to take consistently with the law of the land, which they were bound in any case to follow, or with the recognized principles and customs of international law, and more especially with those principles and customs as recognized and acted upon by the United States themselves.

The Queen's Waiver of Right on the Eve of the Russian War, 28th March, 1854.

The Queen's waiver as to neutral flag.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

It is impossible for Her Majesty to forego her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's dispatches; and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

But Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and Her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

Sir William Molesworth's Speech on the Neutral Flag.*

Sir W. Molesworth on neutral flag.

On the 4th July, 1854, Sir William Molesworth delivered, in the House of Commons, a most learned and powerful speech in support of the maxim "free ships make free goods." He showed that the opposite rule of the Consolato del Mare was early and largely dissented from. "At various times," said Sir William,† "the great majority of European states have been induced to condemn the rule of capturing enemy's goods on board neutral ships, and to expunge that rule from the public law of Europe. The first English treaty which contains the principle 'free ships free goods' was that of Westminster in 1654 between the King of Portugal and Oliver Cromwell. It continued in force till 1810, that is for 156 years. In 1655, the Lord Protector concluded a similar treaty with Louis XIV. How long it continued in force I am unable to say, but in 1677 the rule 'free ships, free goods' was inserted in the treaty of St. Germain en Laye, and was the rule of our amicable relations with France for the next 116 years. From 1677 till 1793 the all-but invariable rule of our friendly intercourse with France was that free ships should give freedom to goods. The first of our treaties with Spain which contained this principle was that of 1665. From that period till 1796, thirteen treaties

* Abridged from *Hansard*.

† Replying to Mr. John George Phillimore.

were concluded with Spain, in every one of which there is an article which either expressly declares that free ships shall give freedom to goods or renews a treaty which contains that position. In our treaties with the United Provinces the invariable rule of our intercourse from 1667 to 1780, was that the ships of the United Provinces should make free the goods of the enemies of England. The treaties between England and the great maritime powers of Western Europe show that between 1654 to 1793 the all-but invariable rule was 'free ships, free goods.' I must, however, admit that the theory of the great maritime powers as expressed in treaties was at variance with their practice during war. The reason is obvious. During peace men's minds have a tendency to conform to what ought to be the rule of international law. But in war passion, hatred, and seeming necessity and the fancied interest of the moment are apt to determine the actions of powerful belligerents who, often relying on their might, set at defiance the best-established rules of war. Every one of the great maritime powers has repeatedly treated neutrals as subjects; and has confiscated not only enemy's goods on board neutral ships, but neutral ships for containing enemy's goods, and has even prohibited all neutral commerce with enemies. Nor has this country shown greater respect than our neighbours for the rights of neutrals. By means of fictitious blockades we have repeatedly claimed the right of stopping the trade of neutrals with our enemies. I must acknowledge the rule free ships free goods, is not contained in some of the treaties between the Northern and Western Powers. But I have shown that the general rule of amicable intercourse as established by treaty between the Northern and

Sir W. Molesworth on neutral flag.

Sir W. Molesworth on neutral flag.

Western Powers, with the exception of England—between the United States and the Old and the New World, and between the Ottoman Porte and the great powers of Europe was free ships free goods. I am, therefore, entitled to assert that, though it has been the usage to act upon the rule of capturing enemy's goods on board neutral ships, yet that usage has been, and still is, held by the great majority of civilized nations to be at variance with correct notions of what is right and just. It is said that the fact that so many treaties contain the rule free ships free goods, and so few the rule of confiscating enemy's goods on board neutral ships, proves that the latter rule was the general rule of public law. The friends of the extension of neutral rights do not deny that this was the general rule of the public law of England and of many other nations. They merely assert that it ought not to be the rule of international law, and that it is contrary to the opinions of the majority of civilized nations."

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